Justice Council

Tuesday April 18, 2006
10:15 – 12:15 AM
404 House Office Building

Meeting Packet

Allan G. Bense
Speaker

Bruce Kyle
Chair

Council Meeting Notice

HOUSE OF REPRESENTATIVES

Speaker Allan G. Bense

Justice Council

Start Date and Time:	Tuesday, April 18, 2006 10:15 am
End Date and Time:	Tuesday, April 18, 2006 12:15 pm
Location:	404 HOB
Duration:	2.00 hrs

Consideration of the following bill(s):

HB 65 CS Foreclosure Proceedings by Porth
HB 85 Assault or Battery on Security Officers by Taylor
HB 271 CS Arrests and Arrestees by Kreegel
HB 327 CS Sexual and Career Offenders by Porth
HB 583 CS Correctional and Law Enforcement Officer Discipline by Traviesa
HB 669 CS Criminal Justice Standards and Training Commission by Dean
HB 815 Strangulation by Russell
HB 839 CS Community Associations by Kottkamp
HB 849 CS Regulation of Foreign Language Court Interpreters by Flores
HB 1139 CS Construction Defects by Murzin
HB 1193 CS Driving Under the Influence by Kottkamp
HB 1443 CS Construction Lien Law by Russell
HB 1577 Personal Identification Information by Brandenburg
HB 1593 Cybercrime by Barreiro
HB 7021 Stolen Property by Criminal Justice Committee
HJR 7037 CS Two-Thirds Vote for Amendment Increasing State Tax of Fee or Resulting in Significant State Spending by Judiciary Committee
HB 7135 Youthful Offenders by Criminal Justice Committee
HB 7137 CS Drug Testing Within the Department of Corrections by Criminal Justice Committee
HB 7201 Voyeurism by Criminal Justice Committee

By request of the Chair, all members are asked to have amendments to bills on the agenda filed by 5 p.m., Monday, April 17, 2006.

NOTICE FINALIZED on 04/14/2006 16:01 by COCHRAN.MARGARET

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 65 CS Residential Foreclosure Proceedings
SPONSOR(S): Porth; Kottkamp
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 166

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee	7 Y, 0 N, w/CS	Bond	Bond
2) Economic Development, Trade & Banking Committee	13 Y, 0 N, w/CS	Olmedillo	Carlson
3) Justice Appropriations Committee	4 Y, 0 N, w/CS	Brazzell	DeBeaugrine
4) Justice Council			
5)			

SUMMARY ANALYSIS

Foreclosure is the legal process for enforcing a lien or mortgage encumbering real property. The foreclosure process results in a forced sale of the property. In some foreclosure cases, the sale price exceeds the amount owed to pay off the lien or mortgage. In such cases, the former property owner may be entitled to proceeds from the sale. Current law does not provide a procedure for distribution of that surplus to the former property owner, requiring the former owner to file court papers to obtain a court order directing the clerk to pay the surplus to the former owner.

This bill seeks to address problems and abuses related to handling surpluses. It:

- Creates a legal presumption that the former owner of the property is entitled to the surplus after payment of subordinate lienholders who timely filed their claim. It requires the clerk of court to mail a copy of the final judgment rendered in a foreclosure proceeding to every party to the action, including parties in default. The final judgment must including notice of a potential surplus.
- Requires that certain disclosures be made before a court will honor a transfer or assignment of the surplus.
- Provides that it is deceptive and unfair trade practice to victimize a person whose home is in foreclosure, creating a civil cause of action.
- Creates a new class of entities to be known as "surplus trustees" and provides for their certification by the Department of Financial Services.
- Creates service fees payable to the clerk of court and the surplus trustee related to foreclosure surpluses.

This bill appears to have a fiscal impact on state and local governments. See "Fiscal Comments", below.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government -- This bill provides additional procedures for foreclosure actions and creates a new cause of action. It also provides for the regulation of surplus trustees and expands the duties of the Department of Financial Services.

Ensure Lower Taxes -- This bill creates new fees.

Promote Personal Responsibility -- This bill increases personal responsibility for injurious behavior by creating a cause of action for deceptive and unfair trade practices.

B. EFFECT OF PROPOSED CHANGES:

Background

Foreclosure is the legal process for enforcement of a security interest in real property. Subject to the owner's right to redemption[1], property subject to foreclosure is sold and the proceeds of the sale are applied against the debt. In most foreclosures, the debt exceeds the net proceeds of the sale.[2] However, due to recent economic forces that have led to substantial inflation in real property values, a growing number of properties are being sold at foreclosure for more than the debt owed on the property. The proceeds of a sale in excess of the debt owed is referred to as the surplus from the sale. In general, the property owner is entitled to the surplus.

A property owner facing foreclosure can seek help from numerous sources. The property owner can negotiate with the foreclosing lender. A different lender may be willing to refinance the property, or offer a second mortgage. The property owner can seek bankruptcy protection. The property owner can sell the property prior to the foreclosure sale. The property owner can borrow from friends and family. Most foreclosure cases are resolved by agreement or redemption of the property.

It has been reported that, with the growing number of foreclosures that may result in a surplus, there is a growing number of entrepreneurs who are offering services to property owners subject to foreclosure. Some of these entrepreneurs are receiving significant profits while the property owners they contract with receive little of their equity in the property. Some of the common means are:

- A lawyer, or a person claiming to be a lawyer, will offer to file the legal papers required to obtain the court order required for the clerk to distribute the surplus to the now (or soon to be) former property owner. The fee arrangement may be a contingency fee. The property owner does not realize that the paperwork is basic enough that most lay persons could easily complete it. [3]

- The entrepreneur offers the property owner a small sum of cash in exchange for an assignment of the surplus.

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[1] Redemption is the right of any property owner to pay the debt at any time prior to the sale, and thereby stop the sale and keep the property. See generally s. 45.0315, F.S.

[2] Where the debt exceeds the sale proceeds, the lender can usually sue for the difference, known as a deficiency. See generally s. 702.06, F.S.

[3] In a related scheme, the Florida Bar has suspended the license of an attorney who was allegedly filing the paperwork necessary to obtain the surplus funds, but without receiving the owner's authority. The lawyer would deduct a 40% fee from the proceeds, and prepare a check payable to the former owner for the remainder. In some cases, the partners would intercept and cash the owner's check. Daily Business Review, *South Florida lawyer accused in mortgage scam is suspended*, Vol. 46, No. 45 (Feb. 11, 2005).

- The entrepreneur offers the property owner a small sum of cash for a quitclaim deed to the property, thereby obtaining the legal right to the surplus.

The procedure for judicial foreclosure sales is set forth in s. 45.031, F.S. The section does not specify how the clerk is to handle a surplus, thus requiring a court order for distribution of the surplus. The section also does not restrict any sale or transfer of the real property, or the right to the surplus, prior to foreclosure.

Effect of Bill

The bill attempts to address problems and abuses in the handling of surpluses from foreclosures.

Disbursement of Surplus Funds

This bill creates s. 45.032, F.S., to provide for disbursement of surplus funds after a judicial foreclosure sale. The bill creates a rebuttable legal presumption that the owner of the property that was foreclosed, as of the date of the filing of the lis pendens, is entitled to the surplus funds unless some other person proves entitlement to the funds. The bill provides a method to rebut the presumption. In addition, the bill specifically states that the legislature intends to abrogate the common law rule that surplus proceeds in a foreclosure case are the property of the owner on the date of the foreclosure sale.

The bill requires the clerk to furnish a copy of the final judgment to every party in the action or to their attorney of record. The final judgment shall provide certain language including a notice of potential surplus, a statement indicating that a subordinate lienholder must file a claim for surplus funds no later than 60 days after the sale, a statement indicating that the property owner does not need to assign his or her rights in the property to claim surplus funds, and a statement indicating that the owner does not need any type of representation to claim such funds.

The bill requires that the publication of sale, which includes the time and place of the sale, now include language stating that any person claiming an interest in the surplus fund must file such claim within 60 days of the date of the sale. The sale of the foreclosed property must be conducted at the time and place indicated in the final judgment.

The clerk continues to be responsible to serve a copy of the Certificate of Sale and Certificate of Title on each party to the action; however, the clerk must now also serve parties in default and include the dollar amount of the sale. The disbursement and available surplus amounts now must be included in the Certificate of Disbursement. In addition, the Certificate of Disbursement must state that any person, other than the rightful owner, must file a claim to surplus funds within 60 days after the sale for such claim to be valid.

The clerk shall hold the surplus funds 60 days after issuance of the Certificate of Disbursement, pending a court order. In the event no one files a claim within 60 days, the clerk shall appoint a "surplus trustee." Upon such appointment, the clerk shall furnish the surplus trustee a copy of a Notice of Appointment of Surplus Trustee, which must include the amount of the available surplus.

The bill allows the surplus trustee one year from the date of appointment to locate the property owner. If after such time the surplus trustee fails to locate the property owner, the clerk shall terminate the appointment and shall treat the remaining surplus funds as unclaimed property to be deposited with the Chief Financial Officer 30 days after such termination.

Any person other than the owner of record who claims the surplus funds has the burden of proving that he or she is entitled to some or all of the surplus funds. The court must consider the factors in s. 45.033, F.S., created by this bill, when hearing a claim that a person other than the owner of record is entitled to the surplus funds.

Transfer or Assignment of Right to Surplus Funds

This bill creates s. 45.033, F.S., to provide criteria for determining whether a sale or assignment of the right to surplus proceeds in a property subject to foreclosure is a valid sale or assignment. The bill creates a rebuttable presumption that the owner of real property as of the date of the filing of a lis pendens is entitled to surplus funds available in a foreclosure of that real property after payment of subordinate lienholders who have timely filed a claim. Another person may rebut that presumption only by proving that:

- The grantee or assignee is a grantee or assignee by virtue of an involuntary transfer or assignment of the right to collect the surplus. An involuntary transfer or assignment may be as a result of inheritance or as a result of the appointment of a guardian.

- A voluntary transfer or assignment shall be a transfer or assignment qualified under this subsection if:
    - The transfer or assignment is in writing, and the instrument:
        - Was executed prior to the foreclosure sale and includes a financial disclosure that specifies the assessed value of the property, a statement that the assessed value may be lower than the actual value of the property, the approximate amount of any debt encumbering the property, and the approximate amount of any equity in the property. If the instrument was executed after the foreclosure sale, the instrument must also specify the foreclosure sale price and the amount of the surplus.
        - Includes a statement that the owner does not need an attorney or other representative to recover surplus funds in a foreclosure.
        - Specifies all forms of consideration paid for the rights to the property or the assignment of the rights to any surplus funds.
    - The transfer or assignment is filed with the court on or before 60 days after the filing of the Certificate of Disbursements.
    - There are funds available to pay the transfer or assignment after payment of timely filed claims of subordinate lienholders.
    - The transferor or assignee is qualified as a surplus trustee, or could qualify as a surplus trustee, pursuant to s. 45.034, F.S.

A transfer or assignment that does not follow these requirements may nevertheless be allowed by the court if the court finds that the instrument was procured in good faith and with no intent to defraud the former owner.

A person who has executed a transfer or assignment that does not conform to the requirements of this section has the right to petition the court presiding over the foreclosure proceeding to set aside the nonconforming transfer or assignment. If the transfer or assignment is set aside, the owner of record will be entitled to the surplus funds after payment of timely filed claims by subordinate lienholders; but the other party may, in a separate proceeding, seek rescission of contract and appropriate damages therein.

The provisions regarding the requirements of an assignment or transfer of the right to collect surplus funds do not apply to a deed, a mortgage, or a deed in lieu of foreclosure, unless a person other than the owner of record is claiming that a deed or mortgage entitles the person to surplus proceeds. Nothing in this section shall affect the title or marketability of the real property that is the subject of the deed or other instrument. The provisions regarding the requirements of an assignment or transfer of the right to collect surplus funds do not affect the validity of a lien evidenced by a mortgage.

Surplus Trustee

The bill authorizes a surplus trustee to locate the owner of surplus funds under certain circumstances. The surplus trustee must apply for certification with the Department of Financial Services (DFS).

Subsequently, the DFS must certify an applicant that qualifies under the requirements of s. 45.034, F.S., for one calendar year.

The primary duty of a surplus trustee is to locate the owner of record within one year of appointment. An application for certification must include the following:

- The name and address of the entity and one or more of its principals;
- A certificate of good standing from the Florida Secretary of State indicating that the entity is a Florida entity;
- A statement under oath by a principal certifying that the entity, or a principal of the entity, has a minimum of 12 months experience in the recovery of surplus funds in foreclosure actions;
- Proof that the entity holds a valid Class "A" private investigators license;
- Proof that the entity carries a minimum of $500,000 in liability insurance, cash reserves or bonding;
- A statement from an attorney licensed to practice in Florida certifying that the attorney is a principal of the entity or is employed by the entity on a full-time basis, and that the attorney will supervise the management of the entity;
- A statement under oath by a principal that he or she understands his or her duty to immediately notify the DFS of the entity's failure to continue to qualify under the relevant statute; and
- A non-refundable fee of $25.

A surplus trustee may renew its qualification by providing the DFS a $25 renewal fee and a statement under oath as to its continued qualification under s. 45.035, F.S.

The DFS shall develop a rotation system for appointment of surplus trustees.

The bill authorizes the surplus trustee to collect service fees, payable from surplus funds, related to its duties.

Deceptive and Unfair Trade Practices Related to Surplus Funds

This bill creates s. 501.2078, F.S., within the Florida Deceptive and Unfair Trade Practices Act (FDUTPA).[4] The FDUTPA creates a number of civil causes of action by which a state attorney, or the Attorney General, may seek injunctive relief, an injunction, and a civil penalty against a person engaging in a deceptive or unfair trade practice. The FDUPTA also creates a civil cause of action by which a person harmed by a deceptive or unfair trade practice may seek a civil judgment against a person engaging in a deceptive and unfair trade practice.[5]

This bill provides that deceptive and unfair trade practices occurring in a foreclosure proceeding of a homeowner may give rise to a civil cause of action under the FDUPTA. The bill also defines "homeowner". The foreclosure must be a "residential foreclosure proceeding", defined as "any action in a circuit court of this state in which a party seeks to foreclose on a mortgage encumbering the mortgagor's primary dwelling."

This bill provides that any person, other than a financial institution as defined by s. 655.005, F.S.,[6] who willfully uses, or has willfully used, a method, act, or practice in violation of FDUPTA, which method, act, or practice victimizes or attempts to victimize homeowners during the course of a residential foreclosure proceeding, and in committing such violation knew or should have known that such conduct was unfair or deceptive, is liable for a civil penalty of not more than $15,000 for each such violation.

[4] See Part II of ch. 501, F.S.
[5] Section 501.211, F.S.
[6] Section 655.005(1)(h), F.S., defines "financial institution" as "a state or federal association, bank, savings bank, trust company, international bank agency, international branch, representative office or international administrative office, or credit union."

Restitution or reimbursement to a homeowner is to be paid first, before payment of any civil penalty. Civil penalties collected are deposited into the Legal Affairs Revolving Trust Fund of the Department of Legal Affairs and allocated solely to the Department of Legal Affairs for "the purpose of preparing and distributing consumer education materials, programs, and seminars to benefit homeowners in residential foreclosure proceedings or to further enforcement efforts."

This bill provides that the following do not constitute grounds for suit under this section of the FDUPTA:

- The act of encumbering the dwelling subject to a residential foreclosure proceeding with a substitute or additional lien.
- A deed in lieu of foreclosure, a workout agreement, a bankruptcy plan, or any other agreement between a foreclosing lender and a homeowner.
- Any action taken by a lender, mortgage broker, assignee of a mortgage, or counsel for any such entity, in foreclosing a mortgage or collecting on the note.

Legal Notices

The prevailing party in any civil action may be entitled to reimbursement of court costs from a non-prevailing party. This bill amends s. 702.035, F.S., to limit an award of costs for a legal advertisement, publication, or notice relating to a foreclosure proceeding to the actual costs charged by the newspaper for the advertisement, publication or notice.

This bill also amends s. 50.013, F.S., to provide in counties with populations of over 1 million persons, statutorily-required legal notices must be placed in newspapers published at least 5 days per week.

Fees

This bill authorizes the clerk to take the following deductions from surplus funds:

- A service charge of up to $60 for making, recording and certifying the sale and title.
- A $25 fee to be used for the purposes of educating the public regarding foreclosure proceedings.
- A $10 fee to notify surplus trustees of surplus funds.
- A $10 fee for each disbursement of surplus.
- A $10 fee to appoint a surplus trustee, furnish the surplus trustee with a copy of the final judgment and a certificate of disbursement, and disburse surplus trustees their costs in advance.

Moreover, the bill provides that a surplus trustee is entitled to a 2% service fee upon notice of appointment and a 10% service charge upon obtaining the order disbursing surplus funds to the owner, which costs are related to the proper payment of the surplus funds.

C. SECTION DIRECTORY:

Section 1 amends s. 45.031, F.S., relating to notice of surplus funds.

Section 2 creates s. 45.032, F.S., providing for distribution of surplus funds.

Section 3 creates s. 45.033, F.S., providing criteria for determination of a valid transfer or assignment of the right to collect surplus funds.

Section 4 creates s. 45.034, F.S., providing qualification and appointment criteria for surplus trustees.

Section 5 creates s. 45.035, F.S., providing for clerks' fees.

Section 6 amends s. 50.013, F.S., to add additional criteria for the newspapers in which legal notices are placed in counties with populations over 1 million persons.

Section 7 creates s. 501.2078, F.S., to provide that victimization of a homeowner involved in a foreclosure action may be a violation of the Florida Deceptive and Unfair Trade Practices Act.

Section 8 amends s. 702.035, F.S., to limit costs related to newspaper advertising chargeable in a foreclosure action.

Section 9 amends s. 201.02, F.S., to correct a cross-reference.

Section 10 provides an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   It is unknown whether the fees provided in the bill will be sufficient to cover the costs of the increased clerk responsibilities. If they are insufficient, clerks of court may require additional funding and thus may be eligible for the Legislative Budget Commission to approve increases to their maximum annual budgets pursuant to s. 28.36, F.S. Any such increases may reduce the contribution to General Revenue made by clerks with surplus revenues. However, to the degree that clerk workload and related costs do not increase, at least a portion of the additional revenues would be eventually deposited into the General Revenue Fund.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   The clerks of court would collect additional revenue; however, since this revenue is court-related, a portion of it ultimately accrues to the state.

2. Expenditures:

   To the degree that a clerk of court's overall workload would increase because of the duties required under this bill, local governments would be impacted.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Certain individuals who are due funds from the surplus remaining after a foreclosure and who would not otherwise claim these funds on their own may be more likely to actually receive those funds given the processes and protections provided by the bill. However, the individual would bear the costs of these processes and protections by being charged fees from the surplus. Fees due to the clerk of court could range up to $85 and fees due to the surplus trustees would be 12% of the surplus. Individuals who claimed surplus funds after the sale but prior to the appointment of a surplus trustee would be liable only for the $25 fee for educating the public regarding foreclosure proceedings.

A new class of entities known as "surplus trustees" would be eligible, upon certification by the Department of Financial Services (DFS), for appointment on a rotating basis to locate individuals due surpluses. Upon appointment, a surplus trustee would receive 2% of the surplus and upon locating the individual would receive 10% of the surplus.

The DFS would receive $25 per entity seeking or renewing certification as a surplus trustee.

D. FISCAL COMMENTS:

During FY 2004-05, there were 59,907 real property and mortgage foreclosures in Florida.[7] The percentage of these foreclosures which were residential, sold by the clerk, and had surplus funds which remained unclaimed by the former homeowner and thus were subject to the fees and charges as provided in this bill is unknown.

This bill authorizes the clerk to take the following deductions from surplus funds:

- A service charge of up to $60 for making, recording and certifying the sale and title.
- A $25 fee to be used for the purposes of educating the public regarding foreclosure proceedings.
- A $10 fee to notify surplus trustees of surplus funds.
- A $10 fee for each disbursement of surplus.
- A $10 fee to appoint a surplus trustee, furnish the surplus trustee with a copy of the final judgment and a certificate of disbursement, and disburse surplus trustees their costs in advance.

Moreover, the bill provides that a surplus trustee is entitled to a 2% service fee upon notice of appointment and a 10% service charge upon obtaining the order disbursing surplus funds to the owner, which costs are related to the proper payment of the surplus funds.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

   None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

   None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On January 11, 2006, the Civil Justice Committee adopted one strike-all amendment. The amendment:

- Removed the notification that was to be attached to every summons served in a foreclosure action.
- Removed the prohibition on contacting persons subject to foreclosure.
- Created a presumption that the owner of record as of the date of the lis pendens is the person entitled to payment of the surplus, unless another person proves his or her right to claim the surplus.
- Created fees for the clerk of court.
- Provided that the clerk can distribute the surplus to the former owner if no other person objects.
- Removed limitations on property transfers that would likely have impacted all real estate closings.

The bill was then reported favorably with a committee substitute.

[7] *FY 2004-05 Statistical Reference Guide*, Office of the State Courts Administrator, p. 3-2.

On March 23, 2006, the Economic Development Trade and Banking Committee adopted a strike-all amendment. This amendment:

- Requires the final judgment rendered in a foreclosure proceeding to include information regarding notice of potential surplus, place and time of sale, and claim filing deadlines.
- Requires the clerk to mail a copy of the final judgment to every party or attorney of record in the action.
- Requires that a statement be placed in a publication of sale indicating that a person must file a claim for surplus funds within 60 days after the clerk issues the Certificate of Title.
- Requires that the certificate of sale include the purchase price.
- Requires certain information in a certificate of disbursement, including filing deadlines, disbursement and surplus amounts.
- Creates a rebuttable presumption that the owner is the owner of the property as of the time a lis pendens is filed and provides a method to rebut the presumption.
- Requires certain disclosures for a voluntary transfer or assignment of rights to be valid.
- Specifies that the legislature abrogates the common law rule that surplus proceeds in a foreclosure case are the property of the owner on the date of the foreclosure sale.
- Requires the clerk to hold the surplus funds for 60 days after issuing the certificate of disbursement, pending a court order.
- Provides that the court shall set an evidentiary hearing to determine entitlement to surplus if claims were filed.
- Removes the requirement that the clerk provide notice to certain persons regarding availability of surplus funds.
- Amends the procedure by which the clerk should locate the property owner when a surplus remains, and it provides that after 60 days, the clerk must appoint a surplus trustee to locate the owner.
- Creates qualifications and appointment procedures for surplus trustees in foreclosure actions, including the requirement that a trustee apply for certification with the Department of Financial Services.
- It provides that a trustee has one year to locate the property owner. Thereafter, the clerk shall terminate the appointment and after 30 days of such termination, surplus funds shall be treated as unclaimed property to be deposited with the Chief Financial Officer.
- Specifies that proceedings regarding surplus funds do not affect or cloud title to the property.
- Provides that trustee may employ subcontractors who are not qualified as surplus trustees.
- Authorizes the clerk to take the following deductions from surplus funds:
  - A service charge of up to $60 for making, recording and certifying the sale and title.
  - A $25 fee to be used for the purposes of educating the public regarding foreclosure proceedings.
  - A $10 fee to notify surplus trustees of surplus funds.
  - A $10 fee for each disbursement of surplus.
  - A $10 fee to appoint a surplus trustee, furnish the surplus trustee a copy of the final judgment and the certificate of disbursement, and disburse trustees their cost in advance.

  Moreover, the bill provides that a surplus trustee is entitled to a 2% service fee upon notice of appointment and a 10% service charge upon obtaining the order disbursing surplus funds to the owner, which costs are related to the proper payment of the surplus funds.

On March 23, 2006, the Judiciary Appropriations Committee adopted a strike-all amendment. This amendment reassigned the responsibilities originally assigned by the bill to the Florida Clerks of Court Operations Corporation from that organization to the Florida Department of Financial Services. This amendment also added a new section to the bill revising s. 50.013, F.S., to specify that in counties with a population of 1 million or more, certain required legal notices must be published in a newspaper published 5 or more days per week.

CHAMBER ACTION

The Judiciary Appropriations Committee recommends the following:

Council/Committee Substitute

Remove the entire bill and insert:

A bill to be entitled

An act relating to foreclosure proceedings; amending s. 45.031, F.S.; revising procedures and requirements for judicial sales; creating s. 45.032, F.S.; providing for disbursement of surplus funds after a judicial sale; providing definitions; establishing a rebuttable presumption of entitlement to surplus funds in certain filings; providing legislative intent; providing requirements and procedures for disbursement of surplus funds by the clerk of court; providing for appointment of a surplus trustee under certain circumstances; providing for notice of appointment; providing for termination of appointment; providing for treatment of surplus funds as unclaimed property under certain circumstances; providing construction relating to title of property in a foreclosure sale; creating s. 45.033, F.S.; providing for a sale or assignment of rights to surplus funds in a property subject to foreclosure; establishing a rebuttable presumption of entitlement to surplus funds; providing

requirements for proof; providing legislative intent; providing requirements for rebutting the presumption; providing requirements for transfers or assignments of surplus funds; providing duties and authority of a court in payment of surplus funds under a transfer or assignment; providing for nonapplication to certain instruments; specifying absence of effect on title or marketability of certain property or validity of certain liens; creating s. 45.034, F.S.; providing qualifications for appointment as a surplus trustee by the Department of Financial Services; providing requirements for appointment as a surplus trustee; providing for application and renewal fees; providing duties of the department in certifying surplus trustees; requiring the department to establish a rotation system for assignment of cases to surplus trustees; providing duties of a surplus trustee; providing entitlement of a surplus trustee to certain service charges and fees; creating s. 45.035, F.S.; specifying service charges for clerks of court for administering judicial sales and surplus funds; amending s. 50.013, F.S.; specifying different newspaper legal notice and process requirements for counties of different population sizes; creating s. 501.2078, F.S.; providing definitions; providing a civil penalty for knowingly using unfair or deceptive homeowner victimization methods, acts, or practices in residential foreclosure proceedings; specifying higher priority of an order of restitution or reimbursement over imposition of a civil penalty;

providing for deposit of civil penalties into the Legal Affairs Revolving Trust Fund of the Department of Legal Affairs; allocating such funds for certain purposes; specifying nonapplication to certain encumbrances, deeds, or actions; amending s. 702.035, F.S.; limiting certain costs chargeable in a foreclosure proceeding; amending s. 201.02, F.S.; correcting a cross-reference; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 45.031, Florida Statutes, is amended to read:

45.031 Judicial sales procedure.--In any sale of real or personal property under an order or judgment, the procedures provided in ss. 45.031-45.035 ~~following procedure~~ may be followed as an alternative to any other sale procedure if so ordered by the court.~~:~~

(1) FINAL JUDGMENT ~~SALE BY CLERK~~.--In the order or final judgment, the court shall direct the clerk to sell the property at public sale on a specified day that shall be not less than 20 days or more than 35 days after the date thereof, on terms and conditions specified in the order or judgment. A sale may be held more than 35 days after the date of final judgment or order if the plaintiff or plaintiff's attorney consents to such time. The final judgment shall contain the following statement in conspicuous type:

IF THIS PROPERTY IS SOLD AT PUBLIC AUCTION, THERE MAY BE ADDITIONAL MONEY FROM THE SALE AFTER PAYMENT OF PERSONS WHO ARE ENTITLED TO BE PAID FROM THE SALE PROCEEDS PURSUANT TO THIS FINAL JUDGMENT.

IF YOU ARE A SUBORDINATE LIENHOLDER CLAIMING A RIGHT TO FUNDS REMAINING AFTER THE SALE, YOU MUST FILE A CLAIM WITH THE CLERK NO LATER THAN 60 DAYS AFTER THE SALE. IF YOU FAIL TO FILE A CLAIM, YOU WILL NOT BE ENTITLED TO ANY REMAINING FUNDS.

IF YOU ARE THE PROPERTY OWNER, YOU MAY CLAIM THESE FUNDS YOURSELF. YOU ARE NOT REQUIRED TO HAVE A LAWYER OR ANY OTHER REPRESENTATION AND YOU DO NOT HAVE TO ASSIGN YOUR RIGHTS TO ANYONE ELSE IN ORDER FOR YOU TO CLAIM ANY MONEY TO WHICH YOU ARE ENTITLED. PLEASE CHECK WITH THE CLERK OF THE COURT, [INSERT INFORMATION FOR APPLICABLE COURT] WITHIN TEN (10) DAYS AFTER THE SALE TO SEE IF THERE IS ADDITIONAL MONEY FROM THE FORECLOSURE SALE THAT THE CLERK HAS IN THE REGISTRY OF THE COURT.

IF YOU DECIDE TO SELL YOUR HOME OR HIRE SOMEONE TO HELP YOU CLAIM THE ADDITIONAL MONEY, YOU SHOULD READ VERY CAREFULLY ALL PAPERS YOU ARE REQUIRED TO SIGN, ASK SOMEONE ELSE, PREFERABLY AN ATTORNEY WHO IS NOT RELATED TO THE PERSON OFFERING TO HELP YOU, TO MAKE SURE THAT YOU UNDERSTAND WHAT YOU ARE SIGNING AND THAT YOU ARE NOT TRANSFERRING YOUR PROPERTY OR THE EQUITY IN YOUR PROPERTY WITHOUT THE PROPER INFORMATION. IF YOU CANNOT AFFORD TO PAY AN ATTORNEY, YOU MAY CONTACT (INSERT LOCAL OR NEAREST LEGAL AID OFFICE AND TELEPHONE PHONE NUMBER) TO SEE IF YOU QUALIFY

FINANCIALLY FOR THEIR SERVICES. IF THEY CANNOT ASSIST YOU, THEY MAY BE ABLE TO REFER YOU TO A LOCAL BAR REFERRAL AGENCY OR SUGGEST OTHER OPTIONS. IF YOU CHOOSE TO CONTACT (NAME OF LOCAL OR NEAREST LEGAL AID OFFICE) FOR ASSISTANCE, YOU SHOULD DO SO AS SOON AS POSSIBLE AFTER RECEIPT OF THIS NOTICE.

A copy of the final judgment shall be furnished by the clerk by first class mail to the last known address of every party to the action or to the attorney of record for such party. Any irregularity in such mailing, including the failure to include this statement in any final judgment or order, shall not affect the validity or finality of the final judgment or order or any sale held pursuant to the final judgment or order. Any sale held more than 35 days after the final judgment or order shall not affect the validity or finality of the final judgment or order or any sale held pursuant to such judgment or order ~~thereto~~.

(2) PUBLICATION OF SALE.--Notice of sale shall be published once a week for 2 consecutive weeks in a newspaper of general circulation, as defined in chapter 50, published in the county where the sale is to be held. The second publication shall be at least 5 days before the sale. The notice shall contain:

(a) A description of the property to be sold.

(b) The time and place of sale.

(c) A statement that the sale will be made pursuant to the order or final judgment.

(d) The caption of the action.

(e) The name of the clerk making the sale.

(f) A statement that any person claiming an interest in the surplus from the sale, if any, other than the property owner as of the date of the lis pendens must file a claim within 60 days after the sale.

~~The clerk shall receive a service charge of up to $60 for services in making, recording, and certifying the sale and title that shall be assessed as costs.~~ The court, in its discretion, may enlarge the time of the sale. Notice of the changed time of sale shall be published as provided herein.

(3) ~~(2)~~ CONDUCT OF SALE; DEPOSIT REQUIRED.--The sale shall be conducted at public auction at the time and place set forth in the final judgment. The clerk shall receive the service charge imposed in s. 45.035 for services in making, recording, and certifying the sale and title that shall be assessed as costs. At the time of the sale, the successful high bidder shall post with the clerk a deposit equal to 5 percent of the final bid. The deposit shall be applied to the sale price at the time of payment. If final payment is not made within the prescribed period, the clerk shall readvertise the sale as provided in this section and pay all costs of the sale from the deposit. Any remaining funds shall be applied toward the judgment.

(4) ~~(3)~~ CERTIFICATION OF SALE.--After a sale of the property the clerk shall promptly file a certificate of sale and serve a copy of it on each party ~~not in default~~ in substantially the following form:

(Caption of Action)

CERTIFICATE OF SALE

The undersigned clerk of the court certifies that notice of public sale of the property described in the order or final judgment was published in _____, a newspaper circulated in _____ County, Florida, in the manner shown by the proof of publication attached, and on _____, (year) , the property was offered for public sale to the highest and best bidder for cash. The highest and best bid received for the property in the amount of $_____ was submitted by _____, to whom the property was sold. The proceeds of the sale are retained for distribution in accordance with the order or final judgment or law. WITNESS my hand and the seal of this court on _____, (year) .

(Clerk)

By (Deputy Clerk)

(5) ~~(4)~~ CERTIFICATE OF TITLE.--If no objections to the sale are filed within 10 days after filing the certificate of sale, the clerk shall file a certificate of title and serve a copy of it on each party ~~not in default~~ in substantially the following form:

(Caption of Action)

CERTIFICATE OF TITLE

The undersigned clerk of the court certifies that he or she executed and filed a certificate of sale in this action on

_____, (year) , for the property described herein and that no objections to the sale have been filed within the time allowed for filing objections.

The following property in _____ County, Florida:

(description)

was sold to .

WITNESS my hand and the seal of the court on _____, (year) .

(Clerk)

By (Deputy Clerk)

(6) ~~(5)~~ CONFIRMATION; RECORDING.--When the certificate of title is filed the sale shall stand confirmed, and title to the property shall pass to the purchaser named in the certificate without the necessity of any further proceedings or instruments.

~~(6) RECORDING.--~~The certificate of title shall be recorded by the clerk.

(7) DISBURSEMENTS OF PROCEEDS.--

(a) On filing a certificate of title, the clerk shall disburse the proceeds of the sale in accordance with the order or final judgment and shall file a report of such disbursements and serve a copy of it on each party ~~not in default~~, and on the Department of Revenue if the department was named as a defendant in the action or if the Agency for Workforce Innovation or the former Department of Labor and Employment Security was named as a defendant while the Department of Revenue was providing unemployment tax collection services under contract with the Agency for Workforce Innovation through an interagency agreement pursuant to s. 443.1316.

(b) The certificate of disbursements shall be~~,~~ in substantially the following form:

(Caption of Action)

CERTIFICATE OF DISBURSEMENTS

The undersigned clerk of the court certifies that he or she disbursed the proceeds received from the sale of the property as provided in the order or final judgment to the persons and in the amounts as follows:

Name Amount

Total disbursements: $_____

Surplus retained by clerk, if any: $_____

IF YOU ARE A PERSON CLAIMING A RIGHT TO FUNDS REMAINING AFTER THE SALE, YOU MUST FILE A CLAIM WITH THE CLERK NO LATER THAN 60 DAYS AFTER THE SALE. IF YOU FAIL TO FILE A CLAIM, YOU WILL NOT BE ENTITLED TO ANY REMAINING FUNDS. AFTER 60 DAYS, ONLY THE OWNER OF RECORD AS OF THE DATE OF THE LIS PENDENS MAY CLAIM THE SURPLUS.

WITNESS my hand and the seal of the court on _____, (year) .

(Clerk)

By (Deputy Clerk)

(c) If no objections to the report are served within 10 days after it is filed, the disbursements by the clerk shall stand approved as reported. If timely objections to the report are served, they shall be heard by the court. Service of objections to the report does not affect or cloud the title of the purchaser of the property in any manner.

(d) If there are funds remaining after payment of all disbursements required by the final judgment of foreclosure and shown on the certificate of disbursements, the surplus shall be distributed as provided ss. 45.031-45.035.

(8) VALUE OF PROPERTY.--The amount of the bid for the property at the sale shall be conclusively presumed to be sufficient consideration for the sale. Any party may serve an objection to the amount of the bid within 10 days after the clerk files the certificate of sale. If timely objections to the bid are served, the objections shall be heard by the court. Service of objections to the amount of the bid does not affect or cloud the title of the purchaser in any manner. If the case is one in which a deficiency judgment may be sought and application is made for a deficiency, the amount bid at the sale may be considered by the court as one of the factors in determining a deficiency under the usual equitable principles.

(9) EXECUTION SALES.--This section shall not apply to property sold under executions.

Section 2. Section 45.032, Florida Statutes, is created to read:

45.032 Disbursement of surplus funds after judicial sale.--

(1) For purposes of ss. 45.031-45.035, the term:

(a) "Owner of record" means the person or persons who appear to be the owner of the property that is the subject of the foreclosure proceeding on the date of the filing of the lis pendens. In determining an owner of record, a person need not perform a title search and examination but may rely on the plaintiff's allegation of ownership in the complaint when determining the owner of record.

(b) "Subordinate lienholder" means the holder of a subordinate lien shown on the face of the pleadings as an encumbrance on the property. A lien being foreclosed on is not a subordinate lien. A subordinate lienholder includes, but is not limited to, a subordinate mortgage, judgment, assessment lien, or construction lien. However, the holder of a subordinate lien shall not be deemed a subordinate lienholder if the holder was paid in full from the proceeds of the sale.

(c) "Surplus funds" or "surplus" means the funds remaining after payment of all disbursements required by the final judgment of foreclosure and shown on the certificate of disbursements.

(d) "Surplus trustee" means a person qualifying as a surplus trustee pursuant to s. 45.034.

(2) There is established a rebuttable legal presumption that the owner of record on the date of the filing of a lis pendens is the person entitled to surplus funds after payment of subordinate lienholders who have timely filed a claim. A person claiming a legal right to the surplus as an assignee of the rights of the owner of record must prove to the court that such

person is entitled to the funds. At any hearing regarding such entitlement, the court shall consider the factors set forth in s. 45.033 in determining whether an assignment is sufficient to overcome the presumption. It is the intent of the Legislature to abrogate the common law rule that surplus proceeds in a foreclosure case are the property of the owner of the property on the date of the foreclosure sale.

(3) During the 60 days after the clerk issues a certificate of disbursements, the clerk shall hold the surplus pending a court order.

(a) If the owner of record claims the surplus during the 60-day period and there is no subordinate lienholder, the court shall order the clerk to deduct any applicable service charges from the surplus and pay the remainder to the owner of record. The clerk may establish a reasonable requirement that the owner of record prove his or her identity before receiving the disbursement. The clerk may assist an owner of record in making a claim. An owner of record may use the following form in making a claim:

(Caption of Action)

OWNER'S CLAIM FOR MORTGAGE FORECLOSURE SURPLUS

State of _____

County of _____

Under penalty of perjury, I (we) hereby certify that:

1. I was (we were) the owner of the following described

real property in _____ County, Florida, prior to the foreclosure sale and as of the date of the filing of the lis pendens:

(Legal description of real property)

2. I (we) do not owe any money on any mortgage on the property that was foreclosed other than the one that was paid off by the foreclosure.

3. I (we) do not owe any money that is the subject of an unpaid judgment, condominium lien, cooperative lien, or homeowners' association.

4. I am (we are) not currently in bankruptcy.

5. I (we) have not sold or assigned my (our) right to the mortgage surplus.

6. My (our) new address is: _____.

7. If there is more than one owner entitled to the surplus, we have agreed that the surplus should be paid _____ jointly, or to : _____, at the following address: _____.

8. I (WE) UNDERSTAND THAT I (WE) AM (ARE) NOT REQUIRED TO HAVE A LAWYER OR ANY OTHER REPRESENTATION AND I (WE) DO NOT HAVE TO ASSIGN MY (OUR) RIGHTS TO ANYONE ELSE IN ORDER TO CLAIM ANY MONEY TO WHICH I (WE) MAY BE ENTITLED.

9. I (WE) UNDERSTAND THAT THIS STATEMENT IS GIVEN UNDER OATH, AND IF ANY STATEMENTS ARE UNTRUE THAT I (WE) MAY BE PROSECUTED CRIMINALLY FOR PERJURY.

(Signatures)

Sworn to (or affirmed) and subscribed before me this _____ day of _____, (year) , by (name of person making statement).

(Signature of Notary Public - State of Florida)

(Print, Type, or Stamp Commissioned Name of Notary Public)

Personally Known _____ OR Produced Identification _____

Type of Identification Produced_____

(b) If any person other than the owner of record claims an interest in the proceeds during the 60-day period or if the owner of record files a claim for the surplus but acknowledges that one or more other persons may be entitled to part or all of the surplus, the court shall set an evidentiary hearing to determine entitlement to the surplus. At the evidentiary hearing, an equity assignee has the burden of proving that he or she is entitled to some or all of the surplus funds. The court may grant summary judgment to a subordinate lienholder prior to or at the evidentiary hearing. The court shall consider the factors in s. 45.033 when hearing a claim that any person other than a subordinate lienholder or the owner of record is entitled to the surplus funds.

(c) If no claim is filed during the 60-day period, the clerk shall appoint a surplus trustee from a list of qualified surplus trustees as authorized in s. 45.034. Upon such appointment, the clerk shall prepare a notice of appointment of surplus trustee and shall furnish a copy to the surplus trustee.

The form of the notice may be as follows:

(Caption of Action)

NOTICE OF APPOINTMENT OF SURPLUS TRUSTEE

The undersigned clerk of the court certifies that he or she disbursed the proceeds received from the sale of the property as provided in the order or final judgment to the persons named in the certificate of disbursements, and that surplus funds of $_____ remain and are subject to disbursement to the owner of record. You have been appointed as surplus trustee for the purpose of finding the owner of record in order for the clerk to disburse the surplus, after deducting costs, to the owner of record.

WITNESS my hand and the seal of the court on _____, (year) .

(Clerk)

By (Deputy Clerk)

(4) If the surplus trustee is unable to locate the owner of record entitled to the surplus within 1 year after appointment, the appointment shall terminate and the clerk shall notify the surplus trustee that his or her appointment was terminated. Thirty days after termination of the appointment of the surplus trustee, the clerk shall treat the remaining funds as unclaimed property to be deposited with the Chief Financial Officer pursuant to chapter 717.

(5) Proceedings regarding surplus funds in a foreclosure

case do not in any manner affect or cloud the title of the purchaser at the foreclosure sale of the property.

Section 3. Section 45.033, Florida Statutes, is created to read:

45.033 Sale or assignment of rights to surplus funds in a property subject to foreclosure.--

(1) There is established a rebuttable presumption that the owner of record of real property on the date of the filing of a lis pendens is the person entitled to surplus funds after payment of subordinate lienholders who have timely filed a claim. A person claiming a legal right to the surplus as an assignee of the rights of the owner of record must prove entitlement to the surplus funds pursuant to this section. It is the intent of the Legislature to abrogate the common law rule that surplus proceeds in a foreclosure case are the property of the owner of the property on the date of the foreclosure sale.

(2) The presumption may be rebutted only by:

(a) The grantee or assignee of a voluntary transfer or assignment establishing a right to collect the surplus funds or any portion or percentage of the surplus funds by proving that the transfer or assignment qualifies as a voluntary transfer or assignment as provided in subsection (3); or

(b) The grantee or assignee proving that the grantee or assignee is a grantee or assignee by virtue of an involuntary transfer or assignment of the right to collect the surplus. An involuntary transfer or assignment may be as a result of inheritance or as a result of the appointment of a guardian.

(3) A voluntary transfer or assignment shall be a transfer or assignment qualified under this subsection, thereby entitling the transferee or assignee to the surplus funds or a portion or percentage of the surplus funds, if:

(a) The transfer or assignment is in writing and the instrument:

1. If executed prior to the foreclosure sale, includes a financial disclosure that specifies the assessed value of the property, a statement that the assessed value may be lower than the actual value of the property, the approximate amount of any debt encumbering the property, and the approximate amount of any equity in the property. If the instrument was executed after the foreclosure sale, the instrument must also specify the foreclosure sale price and the amount of the surplus.

2. Includes a statement that the owner does not need an attorney or other representative to recover surplus funds in a foreclosure.

3. Specifies all forms of consideration paid for the rights to the property or the assignment of the rights to any surplus funds.

(b) The transfer or assignment is filed with the court on or before 60 days after the filing of the certificate of disbursements.

(c) There are funds available to pay the transfer or assignment after payment of timely filed claims of subordinate lienholders.

(d) The transferor or assignee is qualified as a surplus trustee, or could qualify as a surplus trustee, pursuant to s.

45.034.

(4) The court shall honor a transfer or assignment that complies with the requirements of subsection (3), in which case the court shall order the clerk to pay the transferor or assignee from the surplus.

(5) If the court finds that a voluntary transfer or assignment does not qualify under subsection (3) but that the transfer or assignment was procured in good faith and with no intent to defraud the transferor or assignor, the court may order the clerk to pay the claim of the transferee or assignee after payment of timely filed claims of subordinate lienholders.

(6) If a voluntary transfer or assignment of the surplus is set aside, the owner of record shall be entitled to payment of the surplus after payment of timely filed claims of subordinate lienholders, but the transferee or assignee may seek in a separate proceeding repayment of any consideration paid for the transfer or assignment.

(7) This section does not apply to a deed, mortgage, or deed in lieu of foreclosure unless a person other than the owner of record is claiming that a deed or mortgage entitles the person to surplus funds. Nothing in this section affects the title or marketability of the real property that is the subject of the deed or other instrument. Nothing in this section affects the validity of a lien evidenced by a mortgage.

Section 4. Section 45.034, Florida Statutes, is created to read:

45.034 Qualifications and appointment of a surplus trustee in foreclosure actions.--

(1) A surplus trustee is a third-party trustee approved pursuant to this section by the Department of Financial Services. A surplus trustee must be willing to accept cases on a statewide basis; however, a surplus trustee may employ subcontractors that are not qualified as a surplus trustee provided the surplus trustee remains primarily responsible for the duties set forth in this section.

(2) A surplus trustee is an entity that holds and administers surplus proceeds from a foreclosure pursuant to ss. 45.031-45.035.

(3) To be a surplus trustee, an entity must apply for certification with the Department of Financial Services. The application must contain:

(a) The name and address of the entity and of one or more principals of the entity.

(b) A certificate of good standing from the Secretary of State indicating that the entity is an entity registered in this state.

(c) A statement under oath by a principal of the entity certifying that the entity, or a principal of the entity, has a minimum of 12 months' experience in the recovery of surplus funds in foreclosure actions.

(d) Proof that the entity holds a valid Class "A" private investigator license pursuant to chapter 493.

(e) Proof that the entity carries a minimum of $500,000 in liability insurance, cash reserves, or bonding.

(f) A statement from an attorney licensed to practice in this state certifying that the attorney is a principal of the

entity or is employed by the entity on a full-time basis and that the attorney will supervise the management of the entity during the entity's tenure as a surplus trustee.

(g) A statement under oath by a principal of the entity certifying that the principal understands his or her duty to immediately notify the department if the principal ever fails to qualify as an entity entitled to be a surplus trustee.

(h) A nonrefundable application fee of $25.

(4) The Department of Financial Services shall certify any surplus trustee that applies and qualifies. Certification shall be on a calendar year basis. The department may renew a qualification upon receipt of the $25 fee and a statement under oath from a principal of the surplus trustee certifying that the surplus trustee continues to qualify under this section.

(5) The Department of Financial Services shall develop a rotation system for assignment of cases to all qualified surplus trustees.

(6) The primary duty of a surplus trustee is to locate the owner of record within 1 year after appointment. Upon locating the owner of record, the surplus trustee shall file a petition with the court on behalf of the owner of record seeking disbursement of the surplus funds. If more than one person appears to be the owner of record, the surplus trustee shall obtain agreement between such persons as to the payment of the surplus, or file an interpleader. The interpleader may be filed as part of the foreclosure case.

(7) A surplus trustee is entitled to the following service charges and fees which shall be disbursed by the clerk and

payable from the surplus:

(a) Upon obtaining a court order, a cost advance of 2 percent of the surplus.

(b) Upon obtaining a court order disbursing the surplus to the owner of record, a service charge of 10 percent of the surplus.

Section 5. Section 45.035, Florida Statutes, is created to read:

45.035 Clerk's fees.--In addition to other fees or service charges authorized by law, the clerk shall receive service charges related to the judicial sales procedure set forth in ss. 45.031-45.034 and this section:

(1) The clerk shall receive a service charge of $60 for services in making, recording, and certifying the sale and title, which service charge shall be assessed as costs and shall be advanced by the plaintiff before the sale.

(2) If there is a surplus resulting from the sale, the clerk may receive the following service charges, which shall be deducted from the surplus:

(a) The clerk may withhold the sum of $25 from the surplus which may only be used for purposes of educating the public as to the rights of homeowners regarding foreclosure proceedings.

(b) The clerk is entitled to a service charge of $10 for notifying a surplus trustee of his or her appointment.

(c) The clerk is entitled to a service charge of $10 for each disbursement of surplus proceeds.

(d) The clerk is entitled to a service charge of $10 for appointing a surplus trustee, furnishing the surplus trustee

with a copy of the final judgment and the certificate of disbursements, and disbursing to the surplus trustee the trustee's cost advance.

Section 6. Section 50.031, Florida Statutes, is amended to read:

50.031 Newspapers in which legal notices and process may be published.--No notice or publication required to be published in a newspaper in the nature of or in lieu of process of any kind, nature, character or description provided for under any law of the state, whether heretofore or hereafter enacted, and whether pertaining to constructive service, or the initiating, assuming, reviewing, exercising or enforcing jurisdiction or power, by any court in this state, or any notice of sale of property, real or personal, for taxes, state, county or municipal, or sheriff's, guardian's or administrator's or any sale made pursuant to any judicial order, decree or statute or any other publication or notice pertaining to any affairs of the state, or any county, municipality or other political subdivision thereof, shall be deemed to have been published in accordance with the statutes providing for such publication, unless, for a county with less than a total population of 1 million as reflected in the most recent Official Decennial Census of the United States Census Bureau as shown on the official website of the United State Census Bureau, the same shall have been published for the prescribed period of time required for such publication, in a newspaper which at the time of such publication shall have been in existence for 1 year and shall have been entered as periodicals matter at a post office

in the county where published, or in a newspaper which is a direct successor of a newspaper which together have been so published. For counties with more than 1 million total population as reflected in the most recent Official Decennial Census of the United States Census Bureau as shown on the official website of the United States Census Bureau, any notice of publication shall be deemed to have been published in accordance with the law if the notice is published in a newspaper that has been entered as a periodical matter at a post office in the county in which the newspaper is published, is published a minimum of 5 days a week, and has been in existence and published a minimum of 5 days a week for 1 year or is a direct successor to a newspaper that has been in existence for 1 year that has been published a minimum of 5 days a week. ~~; provided,~~ However, this section ~~that nothing herein contained~~ shall not apply ~~where~~ in any county in which there is ~~shall be~~ no newspaper in existence which has ~~shall have~~ been published for the length of time ~~above~~ prescribed in this section. No legal publication of any kind, nature or description, as herein defined, shall be valid or binding or held to be in compliance with the statutes providing for such publication unless the same shall have been published in accordance with the provisions of this section. Proof of such publication shall be made by uniform affidavit.

Section 7. Section 501.2078, Florida Statutes, is created to read:

501.2078 Violations involving individual homeowners during the course of residential foreclosure proceedings; civil penalties.--

(1) As used in this section:

(a) "Homeowner" means any individual who is the owner of the property subject to a residential foreclosure proceeding.

(b) "Residential foreclosure proceeding" means any action in a court of this state in which a party seeks to foreclose on a mortgage encumbering the mortgagor's primary dwelling.

(c) "Victimize" means any course of action intended to dupe, swindle, or cheat a homeowner subject to a residential foreclosure proceeding. The factors that a court shall review when determining whether a course of action is victimizing a homeowner are:

1. The compensation received relative to the risk and the amount of work involved.

2. The number of homeowners involved.

3. The relative bargaining position of the parties.

4. The relative knowledge and sophistication of the parties.

5. Representations made in the inducement.

6. The timing of the agreement.

(2) Any person, other than a financial institution as defined in s. 655.005, who willfully uses, or has willfully used, a method, act, or practice in violation of this part, which method, act, or practice victimizes or attempts to victimize homeowners during the course of a residential foreclosure proceeding, and in committing such violation knew or

should have known that such conduct was unfair or deceptive, is liable for a civil penalty of not more than $15,000 for each such violation.

(3) Any order of restitution or reimbursement based on a violation of this part committed against a homeowner in a residential foreclosure proceeding has priority over the imposition of any civil penalty for such violation pursuant to this section.

(4) Civil penalties collected pursuant to this section shall be deposited into the Legal Affairs Revolving Trust Fund of the Department of Legal Affairs and allocated solely to the Department of Legal Affairs for the purpose of preparing and distributing consumer education materials, programs, and seminars to benefit homeowners in residential foreclosure proceedings or to further enforcement efforts.

(5) This section does not apply to:

(a) The act of encumbering the dwelling subject to a residential foreclosure proceeding with a substitute or additional lien.

(b) A deed in lieu of foreclosure, a workout agreement, a bankruptcy plan, or any other agreement between a foreclosing lender and a homeowner.

(c) A foreclosure sale, eminent domain proceeding, forfeiture, or any other legal process.

Section 8. Section 702.035, Florida Statutes, is amended to read:

702.035 Legal notice concerning foreclosure proceedings.--Whenever a legal advertisement, publication, or

notice relating to a foreclosure proceeding is required to be placed in a newspaper, it is the responsibility of the petitioner or petitioner's attorney to place such advertisement, publication, or notice. The advertisement, publication, or notice shall be placed directly by the attorney for the petitioner, by the petitioner if acting pro se, or by the clerk of the court. Only the actual costs charged by the newspaper for the advertisement, publication, or notice may be charged as costs in the action.

Section 9. Subsection (9) of section 201.02, Florida Statutes, is amended to read:

201.02 Tax on deeds and other instruments relating to real property or interests in real property.--

(9) A certificate of title issued by the clerk of court under s. 45.031(5) ~~(4)~~ in a judicial sale of real property under an order or final judgment issued pursuant to a foreclosure proceeding is subject to the tax imposed by subsection (1). However, the amount of the tax shall be computed based solely on the amount of the highest and best bid received for the property at the foreclosure sale. This subsection is intended to clarify existing law and shall be applied retroactively.

Section 10. This act shall take effect July 1, 2006.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 85 Assault or Battery on Security Officers
SPONSOR(S): Taylor
TIED BILLS: **IDEN./SIM. BILLS:** SB 212

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Criminal Justice Committee	8 Y, 0 N	Kramer	Kramer
2) Criminal Justice Appropriations Committee	4 Y, 0 N	Sneed	DeBeaugrine
3) Justice Council			
4)			
5)			

SUMMARY ANALYSIS

Currently, section 784.087, F.S., reclassifies the felony or misdemeanor degree of assault and battery offenses committed against a law enforcement officer, firefighter or other specified person. The bill adds licensed security officers to the list of specified people. This will have the effect of increasing the maximum sentence that can be imposed for an assault or battery offense committed against a security officer in the same manner as if the offense were committed against a law enforcement officer or firefighter.

The Criminal Justice Impact Conference that met on January 9, 2006 determined that this bill would have an insignificant fiscal impact on the state's prison bed population.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Promote personal responsibility: HB 85 will have the effect of increasing the maximum sentence which may be imposed for an assault or battery offense committed against a licensed security officer.

B. EFFECT OF PROPOSED CHANGES:

Security officers are licensed and regulated by the Department of Agriculture and Consumer Services under chapter 493. The term "security officer" is statutorily defined as follows:

> Any individual who, for consideration, advertises as providing or performs bodyguard services or otherwise guards persons or property; attempts to prevent theft or unlawful taking of goods, wares, and merchandise; or attempts to prevent the misappropriation or concealment of goods, wares or merchandise, money, bonds, stocks, choses in action, notes, or other documents, papers, and articles of value or procurement of the return thereof. The term also includes armored car personnel and those personnel engaged in the transportation of prisoners.[1]

A security officer must have what is known as a Class D license issued by the department.[2] An applicant for a Class D security officer license must have 40 hours of training at a licensed school or training facility.[3] According to the department, as of October 1, 2005, there were 102,083 people statewide with a Class D license.

Currently, section 784.07, F.S., provides that when a person is charged with knowingly committing assault[4], aggravated assault[5], battery[6] or aggravated battery[7] against a law enforcement officer,[8] firefighter,[9] emergency medical care provider,[10] traffic accident investigation officer, traffic infraction

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[1] s. 493.6101(19), F.S.
[2] s. 493.6301(5), F.S.
[3] s. 493.6303(4), F.S.
[4] An assault is an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent. § 784.011, F.S.
[5] An aggravated assault is an assault with a deadly weapon without intent to kill or with an intent to commit a felony. s. 784.021, F.S.
[6] A battery occurs when a person actually and intentionally touches or strikes another person against the will of the other or intentionally causes bodily harm to another person. s. 784.03, F.S
[7] An aggravated battery occurs when a person in committing battery intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement; or uses a deadly weapon. Aggravated battery also occurs if the victim of the battery was pregnant at the time of the offense and the offender knew or should have known that the victim was pregnant. s. 784.045, F.S.
[8] "Law enforcement officer" includes a law enforcement officer, a correctional officer, a correctional probation officer, a part-time law enforcement officer, a part-time correctional officer, an auxiliary law enforcement officer, and an auxiliary correctional officer, as those terms are respectively defined in s. 943.10 and any county probation officer; employee or agent of the Department of Corrections who supervises or provides services to inmates; officer of the Parole Commission; and law enforcement personnel of the Fish and Wildlife Conservation Commission, the Department of Environmental Protection, or the Department of Law Enforcement. s. 784.07(1)(a), F.S.
[9] "Firefighter" means any person employed by any public employer of this state whose duty it is to extinguish fires; to protect life or property; or to enforce municipal, county, and state fire prevention codes, as well as any law pertaining to the prevention and control of fires. s. 784.07(1)(b), F.S.
[10] "Emergency medical care provider" means an ambulance driver, emergency medical technician, paramedic, registered nurse, physician as defined in s. 401.23, medical director as defined in s. 401.23, or any person authorized by an emergency medical service licensed under chapter 401 who is engaged in the performance of his or her duties. The term "emergency medical care provider" also includes physicians, employees, agents, or volunteers of hospitals as defined in chapter 395, who are employed, under contract, or otherwise authorized by a hospital to perform duties directly

enforcement officer, parking enforcement specialist[11] or security officer employed by the board of trustees of a community college while the officer, firefighter or emergency medical care provider is engaged in the lawful performance of his or her duties, the assault of battery offense is reclassified as follows:

- In the case of assault, from a misdemeanor of the second degree to a misdemeanor of the first degree.
- In the case of battery, from a misdemeanor of the first degree to a felony of the third degree.
- In the case of aggravated assault, from a felony of the third degree to a felony of the second degree.
- In the case of aggravated battery, from a felony of the second degree to a felony of the first degree.

Reclassifying an offense has the effect of increasing the maximum sentence that can be imposed for an offense. The maximum sentence that can be imposed for a criminal offense is generally based on the degree of the misdemeanor or felony. The maximum sentence for a second degree misdemeanor is sixty days incarceration; for a first degree misdemeanor is one year of incarceration; for a third degree felony is five years imprisonment; for a second degree felony is fifteen years imprisonment and for a first degree felony is thirty years imprisonment.[12]

HB 85 adds licensed security officers to the specified officers listed above. Therefore, an assault or battery offense committed against a security officer will be reclassified as discussed above. This will have the effect of increasing the maximum sentence that can be imposed for an assault or battery offense committed against a security officer in the same manner as if the offense were committed against a law enforcement officer or firefighter.

C. SECTION DIRECTORY:

Section 1. Amends s. 784.07, F.S. to provide for reclassification of assault or battery on a licensed security officer.

Section 2. Provides July 1, 2006 effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   The Criminal Justice Impact Conference that met on January 9, 2006 determined that this bill would have an insignificant fiscal impact on the state's prison bed population.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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associated with the care and treatment rendered by the hospital's emergency department or the security thereof. s. 784.07(1)(c), F.S.

[11] s. 316.640, F.S.

[12] s. 775.082, F.S.

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

A bill to be entitled

An act relating to assault or battery on security officers; amending s. 784.07, F.S.; providing for reclassification of an assault or battery on a licensed security officer; providing applicability; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (2) of section 784.07, Florida Statutes, is amended to read:

784.07 Assault or battery of law enforcement officers, firefighters, emergency medical care providers, public transit employees or agents, or other specified officers; reclassification of offenses; minimum sentences.--

(2) Whenever any person is charged with knowingly committing an assault or battery upon a law enforcement officer, a firefighter, an emergency medical care provider, a traffic accident investigation officer as described in s. 316.640, a traffic infraction enforcement officer as described in s. 316.640, a parking enforcement specialist as defined in s. 316.640, <u>a person licensed as a security officer as defined in s. 493.6101,</u> or a security officer employed by the board of trustees of a community college, while the officer, firefighter, emergency medical care provider, intake officer, traffic accident investigation officer, traffic infraction enforcement officer, parking enforcement specialist, public transit employee or agent, or security officer is engaged in the lawful

performance of his or her duties, the offense for which the person is charged shall be reclassified as follows:

(a) In the case of assault, from a misdemeanor of the second degree to a misdemeanor of the first degree.

(b) In the case of battery, from a misdemeanor of the first degree to a felony of the third degree.

(c) In the case of aggravated assault, from a felony of the third degree to a felony of the second degree. Notwithstanding any other provision of law, any person convicted of aggravated assault upon a law enforcement officer shall be sentenced to a minimum term of imprisonment of 3 years.

(d) In the case of aggravated battery, from a felony of the second degree to a felony of the first degree. Notwithstanding any other provision of law, any person convicted of aggravated battery of a law enforcement officer shall be sentenced to a minimum term of imprisonment of 5 years.

Section 2. This act shall take effect July 1, 2006, and shall apply to offenses committed on or after that date.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 271 CS Custody of Criminal Defendants
SPONSOR(S): Kreegel and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 688

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Criminal Justice Committee	7 Y, 0 N, w/CS	Cunningham	Kramer
2) Criminal Justice Appropriations Committee	6 Y, 0 N, w/CS	Sneed	DeBeaugrine
3) Justice Council			
4)			
5)			

SUMMARY ANALYSIS

Currently, if a state prisoner is arrested, an outside law enforcement agency (usually the sheriff of the county where the alleged crime occurred) comes to the state institution, arrests the prisoner, and transports the prisoner to a county facility. Counties generally return such prisoners to the prisoner's state institution when the prisoner is no longer needed in court or when a prisoner does not have impending court dates. If the prisoner's presence is later required in court, the sheriff returns to the state institution, assumes temporary custody of the prisoner, and transports the prisoner to a county facility.

This bill provides that, unless otherwise ordered by the court, arrested persons who are in the custody of the Department of Corrections at the time of arrest shall remain in the department's custody pending disposition of the charge, or until the person's sentence of imprisonment expires, whichever occurs earlier. The bill also provides that the provisions of s. 944.17(8), F.S., (requiring the sheriff to assume temporary custody and transport state prisoners to the county jail if the prisoner's presence is required in court for any reason) are to apply if the arrested state prisoner's presence is required in court for any reason.

In addition, this bill creates two additional circumstances where a law enforcement officer can arrest a person without a warrant. Arrests can be made without a warrant if there is probable cause to believe that the person has exposed his or her sexual organs in violation of s. 800.03, F.S., or if there is probable cause to believe that the person has committed an act of voyeurism in violation of s. 810.14 (1), F.S.

The Criminal Justice Impact Conference reviewed this bill on January 9, 2006, and determined that it would have an insignificant fiscal impact on the Department of Corrections prison bed population.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

The bill does not appear to implicate the House principles.

B. EFFECT OF PROPOSED CHANGES:

In 2003, three inmates of Charlotte Correctional Institution were arrested for the murder of Correctional Officer Darla Lathrem and a fellow inmate during an alleged escape attempt. All three inmates were serving life sentences at the time of the murder and have violent criminal histories. Subsequent to the attacks, the Department of Corrections transferred the three inmates to Florida State Prison (FSP), a maximum security institution. After the defendants were indicted[1], counsel for one of the defendants moved the court to have the defendants transferred to the Charlotte County jail pending trial, pursuant to s. 907.04, F.S.[2] Over the objection of the Sheriff and the State, the trial court interpreted s. 907.04, F.S., as mandating that the defendants be held in the custody of the Charlotte County Sheriff in the county jail pending disposition of the charges. At this time, the defendants are still being housed at the Charlotte County jail.

Currently, if a state prisoner is arrested (either for a crime committed while incarcerated or for a crime committed prior to being incarcerated), an outside law enforcement agency[3] (usually the sheriff of the county where the alleged crime occurred) comes to the state institution, arrests the prisoner, assumes temporary custody of the prisoner, and transports the prisoner to a county facility.[4] Currently, counties generally return such prisoners to the prisoner's state institution when the prisoner is no longer needed in court or when a prisoner does not have impending court dates.[5] If the prisoner's presence is later required in court, the sheriff returns to the state institution, assumes temporary custody of the prisoner, and transports the prisoner to a county facility.[6]

This bill provides that, unless otherwise ordered by the court, arrested persons who are in the custody of the Department at the time of arrest shall remain in the Department's custody pending disposition of the charge, or until the person's underlying sentence of imprisonment expires, whichever occurs earlier. This bill also requires the application of the provisions of s. 944.17(8), F.S., if the arrested state prisoner's presence is required in court for any reason.

C. SECTION DIRECTORY:

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[1] The defendants were indicted on charges of capital murder and escape.

[2] Section 907.04, F.S., states in part that if a person who is arrested does not have a right to bail for the offense charged, he or she shall be delivered immediately into the custody of the sheriff of the county in which the indictment, information, or affidavit is filed.

[3] Pursuant to s. 944.31, F.S., Department of Corrections' inspectors who have been designated by the Secretary as law enforcement officers have the authority to arrest state prisoners, but only in certain circumstances. Correctional officers do not have arrest powers. Thus, in most instances, it is not a Department of Corrections' employee who arrests inmates who have committed a crime, but rather an outside law enforcement agency.

[4] Representatives with the Department state that there are occasions where the Department transports a prisoner to a county facility.

[5] Prisoners must be returned to the state institution from which they came. Thus, if a prisoner has numerous court proceedings to attend in a short time-frame, a county that is geographically far away from a prisoner's institution (i.e. the prisoner is incarcerated in north Florida and the new arrest originates from Dade county) may keep the prisoner in a county facility rather than transport the prisoner back and forth across the state numerous times. Counties can also request that DOC transfer a prisoner to a state institution that is closer to the arresting county, though this is not always possible due to lack of bed space, security concerns, etc...

[6] Section 944.17(8), F.S., states in part that if a state prisoner's presence is required in court for any reason after the sheriff has relinquished custody to the Department of Corrections, the court shall issue an order for the sheriff to assume temporary custody and transport the prisoner to the county jail pending the court appearance.

Section 1. Creates ss. (16) and (17) of s. 901.15, F.S.; providing for additional circumstances that would enable a law enforcement officer to make a warrantless arrest based on probable cause.

Section 2. Amends s. 907.04, F.S.; providing that if a person is arrested, and at the time of the arrest is in the custody of the Department of Corrections under sentence of imprisonment, unless otherwise ordered by the court, such person shall remain in the Department of Corrections' custody pending disposition of the charge, or until the person's underlying sentence of imprisonment expires, whichever is earlier; providing that if the arrested state prisoner's presence is required in court, the provisions of s. 944.17(8), F.S., shall apply.

Section 3. This act takes effect on July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   See fiscal comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   See fiscal comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The Department of Corrections states that data to determine the approximate number of inmates this bill would affect is unavailable. However, it appears that counties currently return many state prisoners who have been arrested to state institutions once the prisoner does not have any impending court dates. Thus, because the bill appears to codify an act that, in large part, is currently being practiced, it would not appear to have a significant fiscal impact.

The Criminal Justice Impact Conference reviewed this bill on January 9, 2006, and determined that it would have an insignificant impact on the Department of Corrections prison bed population.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not applicable because this bill does not appear to: require the counties or cities to spend funds or take action requiring the expenditure of funds; reduce the authority that cities or counties have to

raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On January 25, 2006, the Criminal Justice Committee adopted one amendment to the bill and reported the bill favorably with committee substitute. The amendment addressed some of the issues raised in the original bill analysis. Specifically, the amendment: specifies that unless otherwise ordered by the court, a state prisoner will remain in the Department's custody pending disposition of the charge or until the prisoner's underlying sentence of imprisonment expires, whichever occurs earlier. The amendment also includes a reference to s. 944.17(8), F.S., to clarify that it is the sheriff's responsibility to assume temporary custody and transport a prisoner if the prisoner's presence is required in court for any reason.

On April 4, 2006, the Criminal Justice Appropriations Committee adopted one amendment and reported the bill favorably with committee substitute. The amendment creates the following two additional circumstances when a law enforcement officer may make a warrantless arrest: (1) if there is probable cause to believe that the person has exposed his/her sexual organs in violation of s. 800.03, F.S., and (2) if there is probable cause to believe that the person has committed an act of voyeurism in violation of s. 810.14(1), F.S. This bill analyses was drafted based on the bill as amended.

CHAMBER ACTION

The Criminal Justice Appropriations Committee recommends the following:

Council/Committee Substitute

Remove the entire bill and insert:

A bill to be entitled

An act relating to arrests and arrestees; amending s. 901.15, F.S.; providing additional offenses for which a person may be arrested on probable cause and without warrant; amending s. 907.04, F.S.; providing that arrestees in the custody of the Department of Corrections at the time of arrest be retained in the department's custody pending disposition of the charge or until the expiration of the arrestee's original sentence of imprisonment; requiring application of specified provisions if an arrested state prisoner's presence is required in court; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsections (16) and (17) are added to section 901.15, Florida Statutes, to read:

901.15 When arrest by officer without warrant is lawful.--A law enforcement officer may arrest a person without a warrant when:

(16) There is probable cause to believe that the person has committed an exhibition or exposure of his or her sexual organs in violation of s. 800.03.

(17) There is probable cause to believe that the person has committed an act of voyeurism in violation of s. 810.14(1).

Section 2. Section 907.04, Florida Statutes, is amended to read:

907.04 Disposition of defendant upon arrest.--

(1) Except as provided in subsection (2), if a person who is arrested does not have a right to bail for the offense charged, he or she shall be delivered immediately into the custody of the sheriff of the county in which the indictment, information, or affidavit is filed. If the person who is arrested has a right to bail, he or she shall be released after giving bond on the amount specified in the warrant.

(2) If the person who is arrested is, at the time of arrest, in the custody of the Department of Corrections under sentence of imprisonment, unless otherwise ordered by the court, such person shall remain in the department's custody pending disposition of the charge or until the person's underlying sentence of imprisonment expires, whichever occurs earlier. If the arrested state prisoner's presence is required in court for any reason, the provisions of s. 944.17(8) shall apply.

Section 3. This act shall take effect July 1, 2006.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 327 CS Sexual and Career Offenders
SPONSOR(S): Porth
TIED BILLS: **IDEN./SIM. BILLS:** SB 646

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Criminal Justice Committee	8 Y, 0 N, w/CS	Kramer	Kramer
2) Criminal Justice Appropriations Committee	5 Y, 0 N	Burns	DeBeaugrine
3) Justice Council			
4)			
5)			

SUMMARY ANALYSIS

HB 327 expands the list of criminal offenses which qualify an individual for sexual offender or sexual predator registration. The list is expanded to include the offense of selling or buying a minor into sex trafficking or prostitution and the offense of sexual misconduct by a Department of Juvenile Justice program employee with a juvenile offender.

HB 327 amends the definition of the term "institution of higher education" for the purposes of the sexual predator and sexual offender statutes to include career centers. This will require a sexual predator or sexual offender to notify law enforcement and require law enforcement, in turn, to notify the career center when a sexual offender or sexual predator is employed or enrolled there.

The bill provides that a sexual predator or sexual offender must register at a sheriff's office. Currently such registration can occur at a sheriff's office or at a FDLE office. The sheriff will then submit this information to FDLE as under current law.

The bill clarifies circumstances for which a sexual predator or sexual offender is required to report his or her intent to move out of state.

HB 327 revises the operational date used for career offender registration from January 1, 2003 to July 1, 2002.

The bill will have a minimal impact on state expenditures.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government: The bill may require an increased number of individuals to register as sexual predators or sexual offenders.

Promote personal responsibility: Offenders who have been convicted of certain criminal offenses will be required to register as a sexual predator or sexual offender.

B. EFFECT OF PROPOSED CHANGES:

Present Situation

Sexual Predator Registration: As of November 17, 2005, there were 5,492 sexual predators in the state registry. Section 775.21, F.S., provides that a person convicted of an enumerated sexual offense must be designated a "sexual predator." Specifically, a person must be designated a sexual predator if he or she has been convicted of:

1. A capital, life, or first-degree felony violation, or any attempt thereof, of one of the following offenses:
    a. kidnapping or false imprisonment[1] where the victim is a minor and the defendant is not the victim's parent;
    b. sexual battery;[2]
    c. lewd or lascivious offenses;[3]
    d. selling or buying a minor for child pornography;[4] or
    e. a violation of a similar law of another jurisdiction.
2. Any felony violation of one of the following offenses where the offender has previously been convicted of or found to have committed, or has pled nolo contendere or guilty to, regardless of adjudication one of the following offenses:
    a. kidnapping, false imprisonment or luring or enticing a child[5] where the victim is a minor and the defendant is not the victim's parent,
    b. sexual battery;[6]
    c. procuring a person under the age of 18 for prostitution;[7]
    d. lewd or lascivious offenses;
    e. lewd or lascivious battery on an elderly person;[8]
    f. promoting sexual performance by a child;[9]
    g. selling or buying a minor for child pornography; or
    h. a violation of a similar law of another jurisdiction.[10]

In order to be counted as a prior felony, the felony must have resulted in a conviction sentenced separately or an adjudication of delinquency entered separately, prior to the current offense and

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[1] s. 787.01, F.S. or s. 787.02, F.S.,
[2] See chapter 794. F.S.
[3] s. 800.04, F.S.
[4] s. 847.0145, F.S.
[5] s. 787.025, F.S.
[6] Excluded are offenses contained in ss. 794.011(10) and 794.0235, F.S.
[7] s. 796.03, F.S.
[8] s. 825.1025(2)(b), F.S.
[9] s. 827.071, F.S.
[10] Additionally, a person must be designated as a sexual predator if he or she committed one of the offenses listed in a. through h. above and has previously been convicted of the offense of selling or showing obscenity to a minor or using a computer to solicit sexual conduct of or with a minor [ss. 847.0133 or 847.0135, F.S.]

sentenced or adjudicated separately from any other felony conviction that is to be counted as a prior felony.

If the sexual predator is in the custody or control of, or under the supervision of, the Department of Corrections (DOC), or is in the custody of a private correctional facility, the predator must register with the DOC and provide specified information. Private correctional facilities are also governed by these requirements.

If the sexual predator is not in the custody or control of, or under the supervision of, the DOC, or is not in the custody of a private correctional facility, and the predator establishes or maintains a residence in this state, the predator must initially register in person at a Florida Department of Law Enforcement (FDLE) office, or at the sheriff's office in the county of residence within 48 hours after establishing permanent or temporary residence.

Within 48 hours of initial registration, a sexual predator who is not incarcerated and who resides in the community, including a predator under DOC supervision, must register at a driver's license office of the Department of Highway Safety and Motor Vehicles (DHSMV) and present proof of registration, provide specified information, and secure a driver's license, if qualified, or an identification card. Each time a sexual predator's driver's license or identification card is subject to renewal, and within 48 hours after any change in the predator's residence or name, he or she must report in person to a driver's license facility of the DHSMV and is subject to specified registration requirements. This information is provided to FDLE which maintains the statewide registry of all sexual predators and sexual offenders (discussed further below). The department maintains a searchable web-site containing the names and addresses of all sexual predators and offenders as well as a toll-free telephone number.

Registration procedures are also provided for sexual predators who are under federal supervision, in the custody of a local jail, designated as a sexual predator (or another sexual offender designation) in another state and establish or maintain a residence in this state, or are enrolled, employed, or carrying on a vocation at an institution of higher education in this state.

Extensive procedures are provided for notifying communities about certain information relating to sexual predators, much of which is compiled during the registration process. A sexual predator must report in person every six months to the sheriff's office in the county in which he or she resides to reregister.[11]

A sexual predator's failure to comply with registration requirements is a third degree felony.[12] A sexual predator who has been convicted of one a list of enumerated offenses when the victim of the offense was a minor is prohibited from working or volunteering at any business, school, day care center, park, playground, or other place where children regularly congregate. A violation of this provision is a third degree felony.[13]

Sexual offender registration: As of November 17, 2005, there were 30,583 sexual offenders in the state registry. In very general terms, the distinction between a sexual predator and a sexual offender is based on what offense the person has been convicted of, whether the person has previously been convicted of a sexual offense and the date the offense occurred. Specifically, a sexual offender is a person who has been convicted of one of the following offenses and has been released on or after October 1, 1997 from the sanction imposed for the offense:

1. kidnapping, false imprisonment or luring or enticing a child[14] where the victim is a minor and the defendant is not the victim's parent;
2. sexual battery;[15]
3. procuring a person under the age of 18 for prostitution;[16]

[11] s. 775.21(8), F.S.
[12] s. 775.21(10), F.S.
[13] S. 775.21(10)(b), F.S.
[14] s. 787.025, F.S.
[15] Excluded are offenses contained in ss. 794.011(10) and 794.0235, F.S.

4. lewd or lascivious offenses;
5. lewd or lascivious battery on an elderly person;[17]
6. promoting sexual performance by a child;[18]
7. selling or buying a minors for child pornography;
8. selling or showing obscenity to a minor;[19]
9. using a computer to solicit sexual conduct of or with a minor;[20]
10. transmitting child pornography;[21]
11. transmitting material harmful to minors;[22]
12. violating of a similar law of another jurisdiction.

A sexual offender is required to report and register in a manner similar to a sexual predator. Failure of a sexual offender to comply with the registration requirements is a third degree felony.

Effect of Proposed Changes

HB 327 amends the definition of "institution of higher education" within the sexual predator and sexual offender statutes to include career centers. As a result, a sexual predator or sexual offender who is enrolled, employed or carrying on a vocation at a career center will be required to provide to FDLE the name, address and county of the institution as well as additional information and will be required to report any change in enrollment or employment status to the sheriff or Department of Corrections as appropriate. The sheriff will be required to notify the career center of the sexual predator's presence and any change in enrollment or employment status. The change to the definition of institution of higher education is intended to ensure compliance with the federal Campus Sex Crimes Prevention Act.[23]

HB 327 adds to the list of offenses that qualify a person for sexual offender or sexual predator registration the offense of sexual misconduct by a Department of Juvenile Justice program employee (or an employee of a program operated by a provider under a contract with the department) with a juvenile offender.[24] HB 327 also adds the offense of selling or buying of a minor into sex trafficking or prostitution.[25] As such, a person who commits one of these offenses and has a previous conviction for this offense, or another qualifying offense, must be designated a sexual predator. A person who has been convicted of one of these offenses (and has no other prior qualifying offense) will be considered a sexual offender. HB 327 also adds these offenses to the list of offenses which preclude a sexual predator from working or volunteering at a place where children regularly congregate.

The bill clarifies that a person who lives in Florida and has been designated as a sexual predator or sexual offender and who is subject to registration or public notification in another state must register as a sexual offender in Florida, even if the person does not otherwise qualify as a sexual predator or sexual offender under Florida law. According to the FDLE "[t]his change will help ensure compliance with the requirements of the Federal Jacob Wetterling Act mandating state to state notification upon the movement of offenders."

The bill provides that a sexual predator or sexual offender must register at a sheriff's office. Currently such registration can occur at a sheriff's office or at a FDLE office. The sheriff will then submit this information to FDLE as under current law.

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[16] s. 796.03, F.S.
[17] s. 825.1025(2)(b), F.S.
[18] s. 827.071, F.S.
[19] s. 847.0133, F.S.
[20] s. 847.0135, F.S.
[21] s. 847.0137, F.S.
[22] s. 847.0138, F.S.
[23] Codified at 42 U.S.C. 14071(j)
[24] s. 985.4045(1), F.S.
[25] s. 796.035, F.S.

The bill clarifies under what circumstances a sexual predator or sexual offender is required to report his or her intent to move out of state.

HB 327 revises the operational date used for career offender registration from January 1, 2003 to July 1, 2002.

C. SECTION DIRECTORY:

Section 1. Amends s. 775.21, F.S., relating to Florida Sexual Predators Act to add qualifying offenses.

Section 2. Amends s. 775.261, F.S., relating to Florida Career Offender Registration Act.

Section 3. Amends s. 943.0435, F.S, relating to sexual offender registration to modify definitions and add qualifying offenses.

Section 4. Amends s. 944.606, relating to sexual offender notification upon release.

Section 5. Amends s. 944.607, F.S. relating to sexual offender registration to add qualifying offenses.

Section 6. Provides effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   HB 327 will require a person who has been convicted of the offense of sexual misconduct by an employee of the Department of Juvenile Justice or of the offense of selling or buying a minor into sex trafficking to register as a sexual predator or a sexual offender. FDLE has indicated that the changes made by the bill to the sexual offender and sexual predator laws will have a minor impact on the functions of their respective registries. The department states that "[m]odifications and updates will be made to electronic and print training and educational materials and forms. Updates will disburse to local law enforcement, other criminal justice partners and registrants advising of modification to these laws."

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

   None.

D. FISCAL COMMENTS:

   None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require the counties or cities to spend funds or take an action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

The Criminal Justice Committee adopted two amendments. One amended the sexual predator statute to provide that all registrations occur at a sheriff's office and that FDLE offices be removed from this process. This amendment also clarifies circumstances in which a sexual predator is required to report to a sheriff's office. The other amendment made identical changes to the sexual offender statute.

CHAMBER ACTION

The Criminal Justice Committee recommends the following:

Council/Committee Substitute

Remove the entire bill and insert:

A bill to be entitled

An act relating to sexual and career offenders; amending s. 775.21, F.S.; revising the definition of "institution of higher education" to include a career center; revising provisions relating to use of prior felonies for sexual predator determination; removing language allowing a sexual predator to register at a Department of Law Enforcement office; amending s. 775.261, F.S.; revising an operational date used for career offender registration; expanding applicability of registration requirements; amending s. 943.0435, F.S.; removing language allowing a sexual offender to register at a Department of Law Enforcement office; revising language relating to the definition of "sexual offender"; revising the definition of "institution of higher education" to include a career center; revising a provision relating to an offender's driver license or identification card renewal; amending s. 944.606, F.S.; revising language relating to the definition of "sexual offender"; amending s. 944.607,

F.S.; revising language relating to the definition of "sexual offender"; revising the definition of "institution of higher education" to include a career center; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (h) of subsection (2), paragraphs (a) and (b) of subsection (4), paragraph (d) of subsection (5), paragraphs (e), (g), (h), (i), and (j) of subsection (6), and paragraph (b) of subsection (10) of section 775.21, Florida Statutes, are amended to read:

775.21 The Florida Sexual Predators Act.--

(2) DEFINITIONS.--As used in this section, the term:

(h) "Institution of higher education" means a career center, community college, college, state university, or independent postsecondary institution.

(4) SEXUAL PREDATOR CRITERIA.--

(a) For a current offense committed on or after October 1, 1993, upon conviction, an offender shall be designated as a "sexual predator" under subsection (5), and subject to registration under subsection (6) and community and public notification under subsection (7) if:

1. The felony is:

a. A capital, life, or first-degree felony violation, or any attempt thereof, of s. 787.01 or s. 787.02, where the victim is a minor and the defendant is not the victim's parent, or of

chapter 794, s. 800.04, or s. 847.0145, or a violation of a similar law of another jurisdiction; or

b. Any felony violation, or any attempt thereof, of s. 787.01, s. 787.02, or s. 787.025, where the victim is a minor and the defendant is not the victim's parent; chapter 794, excluding ss. 794.011(10) and 794.0235; s. 796.03; s. 796.035; s. 800.04; s. 825.1025(2)(b); s. 827.071; ~~or~~ s. 847.0145; or s. 985.4045(1); or a violation of a similar law of another jurisdiction, and the offender has previously been convicted of or found to have committed, or has pled nolo contendere or guilty to, regardless of adjudication, any violation of s. 787.01, s. 787.02, or s. 787.025, where the victim is a minor and the defendant is not the victim's parent; s. 794.011(2), (3), (4), (5), or (8); s. 794.05; s. 796.03; s. 796.035; s. 800.04; s. 825.1025; s. 827.071; s. 847.0133; s. 847.0135; ~~or~~ s. 847.0145; or s. 985.4045(1);~~,~~ or a violation of a similar law of another jurisdiction;

2. The offender has not received a pardon for any felony or similar law of another jurisdiction that is necessary for the operation of this paragraph; and

3. A conviction of a felony or similar law of another jurisdiction necessary to the operation of this paragraph has not been set aside in any postconviction proceeding.

(b) In order to be counted as a prior felony for purposes of this subsection, the felony must have resulted in a conviction sentenced separately, or an adjudication of delinquency entered separately, prior to the current offense and sentenced or adjudicated separately from any other felony

conviction that is to be counted as a prior felony regardless of the date of offense of the prior felony.

(5) SEXUAL PREDATOR DESIGNATION.--An offender is designated as a sexual predator as follows:

(d) A person who establishes or maintains a residence in this state and who has not been designated as a sexual predator by a court of this state but who has been designated as a sexual predator, as a sexually violent predator, or by another sexual offender designation in another state or jurisdiction and was, as a result of such designation, subjected to registration or community or public notification, or both, or would be if the person was a resident of that state or jurisdiction, without regard to whether the person otherwise meets the criteria for registration as a sexual offender, shall register in the manner provided in s. 943.0435 or s. 944.607 and shall be subject to community and public notification as provided in s. 943.0435 or s. 944.607. A person who meets the criteria of this section is subject to the requirements and penalty provisions of s. 943.0435 or s. 944.607 until the person provides the department with an order issued by the court that designated the person as a sexual predator, as a sexually violent predator, or by another sexual offender designation in the state or jurisdiction in which the order was issued which states that such designation has been removed or demonstrates to the department that such designation, if not imposed by a court, has been removed by operation of law or court order in the state or jurisdiction in which the designation was made, and provided such person no

longer meets the criteria for registration as a sexual offender under the laws of this state.

(6) REGISTRATION.--

(e) If the sexual predator is not in the custody or control of, or under the supervision of, the Department of Corrections, or is not in the custody of a private correctional facility, and establishes or maintains a residence in the state, the sexual predator shall register in person at ~~an office of the department, or at~~ the sheriff's office in the county in which the predator establishes or maintains a residence, within 48 hours after establishing permanent or temporary residence in this state. Any change in the sexual predator's permanent or temporary residence or name, after the sexual predator registers in person at ~~an office of the department or at~~ the sheriff's office, shall be accomplished in the manner provided in paragraphs (g), (i), and (j). When ~~If~~ a sexual predator registers with the sheriff's office, the sheriff shall take a photograph and a set of fingerprints of the predator and forward the photographs and fingerprints to the department, along with the information that the predator is required to provide pursuant to this section.

(g)1. Each time a sexual predator's driver's license or identification card is subject to renewal, and, without regard to the status of the predator's driver's license or identification card, within 48 hours after any change of the predator's residence or change in the predator's name by reason of marriage or other legal process, the predator shall report in person to a driver's license office and shall be subject to the

requirements specified in paragraph (f). The Department of Highway Safety and Motor Vehicles shall forward to the department and to the Department of Corrections all photographs and information provided by sexual predators. Notwithstanding the restrictions set forth in s. 322.142, the Department of Highway Safety and Motor Vehicles is authorized to release a reproduction of a color-photograph or digital-image license to the Department of Law Enforcement for purposes of public notification of sexual predators as provided in this section.

2. A sexual predator who vacates a permanent residence and fails to establish or maintain another permanent or temporary residence shall, within 48 hours after vacating the permanent residence, report in person to ~~the department or~~ the sheriff's office of the county in which he or she is located. The sexual predator shall specify the date upon which he or she intends to or did vacate such residence. The sexual predator must provide or update all of the registration information required under paragraph (a). The sexual predator must provide an address for the residence or other location that he or she is or will be occupying during the time in which he or she fails to establish or maintain a permanent or temporary residence.

3. A sexual predator who remains at a permanent residence after reporting his or her intent to vacate such residence shall, within 48 hours after the date upon which the predator indicated he or she would or did vacate such residence, report in person to the sheriff's office ~~agency~~ to which he or she reported pursuant to subparagraph 2. for the purpose of reporting his or her address at such residence. When ~~If~~ the

sheriff receives the report, the sheriff shall promptly convey the information to the department. An offender who makes a report as required under subparagraph 2. but fails to make a report as required under this subparagraph commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(h) ~~If the sexual predator registers at an office of the department,~~ The department must notify the sheriff and the state attorney of the county and, if applicable, the police chief of the municipality~~,~~ where the sexual predator maintains a residence ~~within 48 hours after the sexual predator registers with the department~~.

(i) A sexual predator who intends to establish residence in another state or jurisdiction other than the State of Florida shall report in person to the sheriff of the county of current residence ~~or the department~~ within 48 hours before the date he or she intends to leave this state to establish residence in another state or jurisdiction. The sexual predator must provide to the sheriff ~~or department~~ the address, municipality, county, and state of intended residence. The sheriff shall promptly provide to the department the information received from the sexual predator. The department shall notify the statewide law enforcement agency, or a comparable agency, in the intended state or jurisdiction of residence of the sexual predator's intended residence. The failure of a sexual predator to provide his or her intended place of residence is punishable as provided in subsection (10).

(j) A sexual predator who indicates his or her intent to reside in another state or jurisdiction other than the State of Florida and later decides to remain in this state shall, within 48 hours after the date upon which the sexual predator indicated he or she would leave this state, report in person to the sheriff ~~or the department, whichever agency is the agency~~ to whom ~~which~~ the sexual predator reported the intended change of residence~~,~~ and report ~~of~~ his or her intent to remain in this state. If the sheriff is notified by the sexual predator that he or she intends to remain in this state, the sheriff shall promptly report this information to the department. A sexual predator who reports his or her intent to reside in another state or jurisdiction, but who remains in this state without reporting to the sheriff ~~or the department~~ in the manner required by this paragraph, commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(10) PENALTIES.--

(b) A sexual predator who has been convicted of or found to have committed, or has pled nolo contendere or guilty to, regardless of adjudication, any violation, or attempted violation, of s. 787.01, s. 787.02, or s. 787.025, where the victim is a minor and the defendant is not the victim's parent; s. 794.011(2), (3), (4), (5), or (8); s. 794.05; s. 796.03; s. 796.035; s. 800.04; s. 827.071; s. 847.0133; ~~or~~ s. 847.0145; or s. 985.4045(1);~~,~~ or a violation of a similar law of another jurisdiction~~,~~ when the victim of the offense was a minor, and who works, whether for compensation or as a volunteer, at any

business, school, day care center, park, playground, or other place where children regularly congregate, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Section 2. Paragraph (a) of subsection (3) of section 775.261, Florida Statutes, is amended to read:

775.261 The Florida Career Offender Registration Act.--

(3) CRITERIA FOR REGISTRATION AS A CAREER OFFENDER.--

(a) A career offender released on or after July 1, 2002 ~~January 1, 2003~~, from a sanction imposed in this state ~~for a designation as a habitual violent felony offender, a violent career criminal, or a three-time violent felony offender under s. 775.084 or as a prison releasee reoffender under s. 775.082(9)~~ must register as required under subsection (4) and is subject to community and public notification as provided under subsection (5). For purposes of this section, a sanction imposed in this state includes, but is not limited to, a fine, probation, community control, parole, conditional release, control release, or incarceration in a state prison, private correctional facility, or local detention facility, and:

1. The career offender has not received a pardon for any felony or other qualified offense that is necessary for the operation of this paragraph; or

2. A conviction of a felony or other qualified offense necessary to the operation of this paragraph has not been set aside in any postconviction proceeding.

Section 3. Paragraphs (a) and (d) of subsection (1), subsections (2), (4), (7), and (8), and paragraph (c) of

subsection (11) of section 943.0435, Florida Statutes, are amended to read:

943.0435 Sexual offenders required to register with the department; penalty.--

(1) As used in this section, the term:

(a) "Sexual offender" means a person who meets the criteria in subparagraph 1., subparagraph 2., or subparagraph 3., as follows:

1.a. Has been convicted of committing, or attempting, soliciting, or conspiring to commit, any of the criminal offenses proscribed in the following statutes in this state or similar offenses in another jurisdiction: s. 787.01, s. 787.02, or s. 787.025, where the victim is a minor and the defendant is not the victim's parent; chapter 794, excluding ss. 794.011(10) and 794.0235; s. 796.03; s. 796.035; s. 800.04; s. 825.1025; s. 827.071; s. 847.0133; s. 847.0135; s. 847.0137; s. 847.0138; s. 847.0145; or s. 985.4045(1); or any similar offense committed in this state which has been redesignated from a former statute number to one of those listed in this sub-subparagraph ~~subparagraph~~; and

b.~~2.~~ Has been released on or after October 1, 1997, from the sanction imposed for any conviction of an offense described in sub-subparagraph a. ~~subparagraph 1.~~ For purposes of sub-subparagraph a. ~~subparagraph 1.~~, a sanction imposed in this state or in any other jurisdiction includes, but is not limited to, a fine, probation, community control, parole, conditional release, control release, or incarceration in a state prison,

federal prison, private correctional facility, or local detention facility; ~~or~~

2.~~3.~~ Establishes or maintains a residence in this state and who has not been designated as a sexual predator by a court of this state but who has been designated as a sexual predator, as a sexually violent predator, or by another sexual offender designation in another state or jurisdiction and was, as a result of such designation, subjected to registration or community or public notification, or both, or would be if the person were a resident of that state or jurisdiction, without regard to whether the person otherwise meets the criteria for registration as a sexual offender; or

3.~~4.~~ Establishes or maintains a residence in this state who is in the custody or control of, or under the supervision of, any other state or jurisdiction as a result of a conviction for committing, or attempting, soliciting, or conspiring to commit, any of the criminal offenses proscribed in the following statutes or similar offense in another jurisdiction: s. 787.01, s. 787.02, or s. 787.025, where the victim is a minor and the defendant is not the victim's parent; chapter 794, excluding ss. 794.011(10) and 794.0235; s. 796.03; s. 796.035; s. 800.04; s. 825.1025; s. 827.071; s. 847.0133; s. 847.0135; s. 847.0137; s. 847.0138; s. 847.0145; or s. 985.4045(1); or any similar offense committed in this state which has been redesignated from a former statute number to one of those listed in this subparagraph.

(d) "Institution of higher education" means a career center, community college, college, state university, or independent postsecondary institution.

(2) A sexual offender shall:

(a) Report in person at ~~an office of the department, or at~~ the sheriff's office in the county in which the offender establishes or maintains a permanent or temporary residence, within 48 hours after establishing permanent or temporary residence in this state or within 48 hours after being released from the custody, control, or supervision of the Department of Corrections or from the custody of a private correctional facility. Any change in the sexual offender's permanent or temporary residence or name, after the sexual offender reports in person at ~~an office of the department or at~~ the sheriff's office, shall be accomplished in the manner provided in subsections (4), (7), and (8).

(b) Provide his or her name, date of birth, social security number, race, sex, height, weight, hair and eye color, tattoos or other identifying marks, occupation and place of employment, address of permanent or legal residence or address of any current temporary residence, within the state and out of state, including a rural route address and a post office box, date and place of each conviction, and a brief description of the crime or crimes committed by the offender. A post office box shall not be provided in lieu of a physical residential address.

1. If the sexual offender's place of residence is a motor vehicle, trailer, mobile home, or manufactured home, as defined in chapter 320, the sexual offender shall also provide to the

department written notice of the vehicle identification number; the license tag number; the registration number; and a description, including color scheme, of the motor vehicle, trailer, mobile home, or manufactured home. If the sexual offender's place of residence is a vessel, live-aboard vessel, or houseboat, as defined in chapter 327, the sexual offender shall also provide to the department written notice of the hull identification number; the manufacturer's serial number; the name of the vessel, live-aboard vessel, or houseboat; the registration number; and a description, including color scheme, of the vessel, live-aboard vessel, or houseboat.

2. If the sexual offender is enrolled, employed, or carrying on a vocation at an institution of higher education in this state, the sexual offender shall also provide to the department the name, address, and county of each institution, including each campus attended, and the sexual offender's enrollment or employment status. Each change in enrollment or employment status shall be reported in person at ~~an office of the department, or at~~ the sheriff's office, within 48 hours after any change in status. The sheriff shall promptly notify each institution of the sexual offender's presence and any change in the sexual offender's enrollment or employment status.

When ~~If~~ a sexual offender reports at the sheriff's office, the sheriff shall take a photograph and a set of fingerprints of the offender and forward the photographs and fingerprints to the department, along with the information provided by the sexual

offender. The sheriff shall promptly provide to the department the information received from the sexual offender.

(4)(a) Each time a sexual offender's driver's license or identification card is subject to renewal, and, without regard to the status of the offender's ~~predator's~~ driver's license or identification card, within 48 hours after any change in the offender's permanent or temporary residence or change in the offender's name by reason of marriage or other legal process, the offender shall report in person to a driver's license office, and shall be subject to the requirements specified in subsection (3). The Department of Highway Safety and Motor Vehicles shall forward to the department all photographs and information provided by sexual offenders. Notwithstanding the restrictions set forth in s. 322.142, the Department of Highway Safety and Motor Vehicles is authorized to release a reproduction of a color-photograph or digital-image license to the Department of Law Enforcement for purposes of public notification of sexual offenders as provided in ss. 943.043, 943.0435, and 944.606.

(b) A sexual offender who vacates a permanent residence and fails to establish or maintain another permanent or temporary residence shall, within 48 hours after vacating the permanent residence, report in person to the ~~department or the~~ sheriff's office of the county in which he or she is located. The sexual offender shall specify the date upon which he or she intends to or did vacate such residence. The sexual offender must provide or update all of the registration information required under paragraph (2)(b). The sexual offender must

provide an address for the residence or other location that he or she is or will be occupying during the time in which he or she fails to establish or maintain a permanent or temporary residence.

(c) A sexual offender who remains at a permanent residence after reporting his or her intent to vacate such residence shall, within 48 hours after the date upon which the offender indicated he or she would or did vacate such residence, report in person to the agency to which he or she reported pursuant to paragraph (b) for the purpose of reporting his or her address at such residence. When ~~If~~ the sheriff receives the report, the sheriff shall promptly convey the information to the department. An offender who makes a report as required under paragraph (b) but fails to make a report as required under this paragraph commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(7) A sexual offender who intends to establish residence in another state or jurisdiction other than the State of Florida shall report in person to the sheriff of the county of current residence ~~or the department~~ within 48 hours before the date he or she intends to leave this state to establish residence in another state or jurisdiction. The notification must include the address, municipality, county, and state of intended residence. The sheriff shall promptly provide to the department the information received from the sexual offender. The department shall notify the statewide law enforcement agency, or a comparable agency, in the intended state or jurisdiction of residence of the sexual offender's intended residence. The

failure of a sexual offender to provide his or her intended place of residence is punishable as provided in subsection (9).

(8) A sexual offender who indicates his or her intent to reside in another state or jurisdiction other than the State of Florida and later decides to remain in this state shall, within 48 hours after the date upon which the sexual offender indicated he or she would leave this state, report in person to the sheriff ~~or department, whichever agency is the agency~~ to whom ~~which~~ the sexual offender reported the intended change of residence~~,~~ and report ~~of~~ his or her intent to remain in this state. ~~If the sheriff is notified by the sexual offender that he or she intends to remain in this state,~~ The sheriff shall promptly report this information to the department. A sexual offender who reports his or her intent to reside in another state or jurisdiction but who remains in this state without reporting to the sheriff ~~or the department~~ in the manner required by this subsection commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(11) A sexual offender must maintain registration with the department for the duration of his or her life, unless the sexual offender has received a full pardon or has had a conviction set aside in a postconviction proceeding for any offense that meets the criteria for classifying the person as a sexual offender for purposes of registration. However, a sexual offender:

(c) As defined in subparagraph (1)(a)2.~~3.~~ must maintain registration with the department for the duration of his or her

life until the person provides the department with an order issued by the court that designated the person as a sexual predator, as a sexually violent predator, or by another sexual offender designation in the state or jurisdiction in which the order was issued which states that such designation has been removed or demonstrates to the department that such designation, if not imposed by a court, has been removed by operation of law or court order in the state or jurisdiction in which the designation was made, and provided such person no longer meets the criteria for registration as a sexual offender under the laws of this state.

Section 4. Paragraph (b) of subsection (1) of section 944.606, Florida Statutes, is amended to read:

944.606 Sexual offenders; notification upon release.--

(1) As used in this section:

(b) "Sexual offender" means a person who has been convicted of committing, or attempting, soliciting, or conspiring to commit, any of the criminal offenses proscribed in the following statutes in this state or similar offenses in another jurisdiction: s. 787.01, s. 787.02, or s. 787.025, where the victim is a minor and the defendant is not the victim's parent; chapter 794, excluding ss. 794.011(10) and 794.0235; s. 796.03; s. 796.035; s. 800.04; s. 825.1025; s. 827.071; s. 847.0133; s. 847.0135; s. 847.0137; s. 847.0138; s. 847.0145; or s. 985.4045(1); or any similar offense committed in this state which has been redesignated from a former statute number to one of those listed in this subsection, when the department has received verified information regarding such conviction; an

offender's computerized criminal history record is not, in and of itself, verified information.

Section 5. Paragraphs (a) and (c) of subsection (1) of section 944.607, Florida Statutes, are amended to read:

944.607 Notification to Department of Law Enforcement of information on sexual offenders.--

(1) As used in this section, the term:

(a) "Sexual offender" means a person who is in the custody or control of, or under the supervision of, the department or is in the custody of a private correctional facility:

1. On or after October 1, 1997, as a result of a conviction for committing, or attempting, soliciting, or conspiring to commit, any of the criminal offenses proscribed in the following statutes in this state or similar offenses in another jurisdiction: s. 787.01, s. 787.02, or s. 787.025, where the victim is a minor and the defendant is not the victim's parent; chapter 794, excluding ss. 794.011(10) and 794.0235; s. 796.03; s. 796.035; s. 800.04; s. 825.1025; s. 827.071; s. 847.0133; s. 847.0135; s. 847.0137; s. 847.0138; s. 847.0145; or s. 985.4045(1); or any similar offense committed in this state which has been redesignated from a former statute number to one of those listed in this paragraph; or

2. Who establishes or maintains a residence in this state and who has not been designated as a sexual predator by a court of this state but who has been designated as a sexual predator, as a sexually violent predator, or by another sexual offender designation in another state or jurisdiction and was, as a result of such designation, subjected to registration or

community or public notification, or both, or would be if the person were a resident of that state or jurisdiction, without regard as to whether the person otherwise meets the criteria for registration as a sexual offender.

(c) "Institution of higher education" means a career center, community college, college, state university, or independent postsecondary institution.

Section 6. This act shall take effect July 1, 2006.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 583 CS Correctional and Law Enforcement Officer Discipline
SPONSOR(S): Traviesa
TIED BILLS: **IDEN./SIM. BILLS:** SB 1552

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Criminal Justice Committee	7 Y, 1 N, w/CS	Cunningham	Kramer
2) Governmental Operations Committee	5 Y, 0 N, w/CS	Mitchell	Williamson
3) Justice Council			
4)			
5)			

SUMMARY ANALYSIS

This bill creates two new requirements for any person preparing an investigative report or summary resulting from the investigation of a complaint involving a law enforcement officer or correctional officer. First, the preparer must verify that the contents of the report are true and accurate based upon the person's personal knowledge, information, and belief. Second, the report preparer must swear that he or she has not, or allowed another to, deprive the law enforcement officer or correctional officer of certain statutory rights. These requirements must be met prior to any determination as to whether to proceed with disciplinary action or to file disciplinary charges.

The bill also requires that all statements provided by a law enforcement officer or correctional officer during the course of a complaint investigation be made under oath. The bill permits prosecution for perjury if a law enforcement officer or correctional officer gives knowingly false statements when under investigation.

This bill does not appear to create, modify, or eliminate rulemaking authority.

This bill does not appear to have a fiscal impact on state or local government revenues. This bill does not appear to have a fiscal impact on state or local government expenditures.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government – This bill increases requirements for personnel investigating a complaint and preparing an investigative report involving law enforcement officers or correctional officers. The bill also increases the requirements for statements of law enforcement officers and correctional officers when a complaint is being investigated.

B. EFFECT OF PROPOSED CHANGES:

Rights of Law Enforcement Officers and Correctional Officers

Law enforcement officers[1] and correctional officers[2] have certain statutory rights and privileges while under investigation. Part VI of chapter 112, commonly known as the "Law Enforcement Officers' Bill of Rights," grants law enforcement officers and correctional officers specific rights when the officer is under investigation and subject to interrogation by members of his or her agency for any reason which could lead to disciplinary action, demotion or dismissal.[3] If an agency fails to comply with the provisions of the Law Enforcement Officers' Bill of Rights, an officer who is personally injured by such failure to comply may apply directly to the circuit court of the county where the agency is headquartered for an injunction to restrain and enjoin the violation and to compel performance of the agency's duties.[4] Such officer may also file a civil suit for damages.[5]

Investigative Reports

Section 112.533, Florida Statutes, requires law enforcement and correctional agencies to establish procedures for the receipt, investigation, and determination of complaints against law enforcement and correctional officers. These procedures vary from agency to agency. Yet, in most instances, agencies investigate when a complaint is filed against an officer and also generate investigative reports that summarize the agency's findings.

There are currently criminal penalties for making false investigative reports.[6] There is, however, no specific statutory requirement for the person preparing an investigative report involving a law enforcement officer or correctional officer to verify, pursuant to section 92.525, Florida Statutes,[7] that the contents of the report are true and accurate based upon the preparer's personal knowledge and belief. There also is not a statutory requirement that the person preparing an investigative report include any type of statement regarding compliance with the Law Enforcement Officer's Bill of Rights.

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[1] Fla. Stat. § 112.531(1) (2005) ("Any person, other than a chief of police, who is employed full time by any municipality or the state or any political subdivision thereof and whose primary responsibility is the prevention and detection of crime or the enforcement of the penal, traffic, or highway laws of this state; and includes any person who is appointed by the sheriff as a deputy sheriff pursuant to section 30.07, Florida Statutes.").

[2] Fla. Stat. § 121.531(2) (2005) ("Any person, other than a warden, who is appointed or employed full time by the state or any political subdivision thereof whose primary responsibility is the supervision, protection, care, custody, or control of inmates within a correctional institution, including correctional probation officers.").

[3] See, *e.g.,* Fla. Stat. § 112.532(1) (2005) (requiring the interrogation to be conducted at a reasonable hour, preferably at a time when the law enforcement officer or correctional officer is on duty).

[4] Fla. Stat. § 112.534 (2005).

[5] Fla. Stat. § 112.532(3) (2005).

[6] *See*, e.g., Fla. Stat. § 837.06, F.S., (whoever knowingly makes a false statement in writing with the intent to mislead a public servant in the performance of his/her official duties is guilty of a second degree misdemeanor); s. 838.022, F.S., (It is unlawful for a public servant, with corrupt intent to obtain a benefit for any person or to cause harm to another, to falsify, or cause another person to falsify, any official record or official document); s. 944.33, F.S., (If any prison inspector knowingly makes a false report of his/ her findings, he/she shall is guilty of a third degree felony).

[7] Fla. Stat. § 92.525 (2005) (provides two methods of document verification (by oath or affirmation or by the signing of a written declaration) and provides that it is a third degree felony to knowingly make a false declaration.

Similarly, there is no requirement that a statement of the law enforcement officer or correctional officer be made under oath or subject to prosecution for perjury.

Additional Requirements for Complaint Investigators

This bill creates two new requirements for the person preparing any investigative report or summary[8] resulting from the investigation of a complaint involving a law enforcement officer or correctional officer:

1. Verify[9] that the contents of the report are true and accurate based upon the person's personal knowledge, information, and belief; and

2. Include the following sworn[10] statement:

   "I, the undersigned, do hereby swear, under penalty of perjury, that, to the best of my personal knowledge, information and belief, I have not knowingly or willfully deprived, or allowed another to deprive, the subject of the investigation of any of the rights contained in ss. 112.532 and 112.533, Florida Statutes."

The bill further requires completion of the verification and statement prior to the determination as to whether to proceed with disciplinary action or to file disciplinary charges.

Additional Requirements for Officers

The bill also creates a new requirement for law enforcement officers and correctional officers: that all statements[11] provided during the course of a complaint investigation be made under oath pursuant to section 92.525, Florida Statutes, and subject to prosecution for perjury if a knowingly false statement is given.[12]

C. SECTION DIRECTORY:

Section 1: Amends section 112.533, Florida Statutes, to require verification of contents and sworn compliance with certain procedures by persons preparing investigative reports or summaries; also requires sworn statements subject to prosecution for perjury for officers being investigated.

Section 2: Provides that this bill takes effect upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   This bill does not appear to have a fiscal impact on state government revenues.

2. Expenditures:

   This bill does not appear to have a fiscal impact on state government expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

[8] Fla. HB 583 CS (2005) (These requirements apply only if there is such a report and "regardless of form.").
[9] Fla. HB 583 CS (2005) (pursuant to section 92.525, Florida Statutes).
[10] *Id.*
[11] Fla. HB 583 CS (2005) (This requirement applies regardless of form.).
[12] Fla. HB 583 CS (2005) (This requirement is included as part of provisions which allow the officer who is the subject of a complaint, along with legal counsel or other representative, to review the complaint and all statements immediately prior to the beginning of an investigative interview.).

1. Revenues:

   This bill does not appear to have a fiscal impact on local government revenues.

2. Expenditures:

   This bill does not appear to have a fiscal impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

There does not appear to be a direct economic impact on the private sector.

D. FISCAL COMMENTS:

There are no fiscal comments.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not applicable because this bill does not appear to: require the municipalities or counties to spend funds or take action requiring the expenditure of funds; reduce the authority that municipalities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

   There do not appear to be any other constitutional issues.

B. RULE-MAKING AUTHORITY:

This bill does not appear to create, modify, or eliminate rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

There are not any drafting issues or other comments.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

Criminal Justice Committee

On March 22, 2006, the Criminal Justice Committee adopted a strike-all amendment to the bill and reported the bill favorably with committee substitute. The strike-all amendment removed section 2 of the original bill, which required agencies to maintain a log documenting the receipt of complaints alleging a violation of an officer's rights; investigate and issue a report regarding such complaints; remove the investigating officer who is the subject of the complaint from internal investigative responsibilities and take other appropriate disciplinary actions if the report sustained a violation; and place the investigative report and supporting documents into the removed investigator's personnel file, invalidate the original investigation, and reinvestigate the original complaint if the reported sustained a violation. In addition, the strike-all requires certain investigative reports to include a statement relating to compliance with the Law Enforcement Officer's Bill of Rights.

Governmental Operations Committee

On April 5, 2006, the Governmental Operations Committee adopted an amendment to the bill and reported the bill favorably with committee substitute. The amendment required all statements provided by a law enforcement or correctional officer during the course of a complaint investigation to be made under oath. The amendment also provided that knowingly false statements given by a law enforcement officer or correctional officer may result in a prosecution for perjury.

CHAMBER ACTION

The Governmental Operations Committee recommends the following:

Council/Committee Substitute

Remove the entire bill and insert:

A bill to be entitled

An act relating to correctional and law enforcement officer discipline; amending s. 112.533, F.S.; requiring certain investigative reports to include a statement relating to compliance with ss. 112.532 and 112.533, F.S., and to be verified; requiring certain statements to be made under oath and subject to prosecution for perjury; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (1) and paragraph (a) of subsection (2) of section 112.533, Florida Statutes, are amended to read:

112.533 Receipt and processing of complaints.--

(1) Every law enforcement agency and correctional agency shall establish and put into operation a system for the receipt, investigation, and determination of complaints received by such agency from any person, which shall be the procedure for investigating a complaint against a law enforcement and

correctional officer and for determining whether to proceed with disciplinary action or to file disciplinary charges, notwithstanding any other law or ordinance to the contrary. When law enforcement or correctional agency personnel assigned the responsibility of investigating the complaint prepare an investigative report or summary, regardless of form, the person preparing the report shall, at the time the report is completed:

(a) Verify pursuant to s. 92.525 that the contents of the report are true and accurate based upon the person's personal knowledge, information, and belief.

(b) Include the following statement, sworn and subscribed to pursuant to s. 92.525:

"I, the undersigned, do hereby swear, under penalty of perjury, that, to the best of my personal knowledge, information, and belief, I have not knowingly or willfully deprived, or allowed another to deprive, the subject of the investigation of any of the rights contained in ss. 112.532 and 112.533, Florida Statutes."

The requirements of paragraphs (a) and (b) shall be completed prior to the determination as to whether to proceed with disciplinary action or to file disciplinary charges. This subsection does not preclude the Criminal Justice Standards and Training Commission from exercising its authority under chapter 943.

(2)(a) A complaint filed against a law enforcement officer or correctional officer with a law enforcement agency or correctional agency and all information obtained pursuant to the

investigation by the agency of such complaint shall be confidential and exempt from the provisions of s. 119.07(1) until the investigation ceases to be active, or until the agency head or the agency head's designee provides written notice to the officer who is the subject of the complaint, either personally or by mail, that the agency has either:

1. Concluded the investigation with a finding not to proceed with disciplinary action or to file charges; or

2. Concluded the investigation with a finding to proceed with disciplinary action or to file charges.

Notwithstanding the foregoing provisions, the officer who is the subject of the complaint, along with legal counsel or any other representative of his or her choice, may review the complaint and all statements regardless of form made by the complainant and witnesses immediately prior to the beginning of the investigative interview. All statements, regardless of form, provided by a law enforcement officer or correctional officer during the course of a complaint investigation of that officer shall be made under oath pursuant to s. 92.525. Knowingly false statements given by a law enforcement officer or correctional officer under investigation may subject the law enforcement officer or correctional officer to prosecution for perjury. If a witness to a complaint is incarcerated in a correctional facility and may be under the supervision of, or have contact with, the officer under investigation, only the names and written statements of the complainant and nonincarcerated witnesses may be reviewed by the officer under investigation

immediately prior to the beginning of the investigative interview.

Section 2. This act shall take effect upon becoming a law.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 669 CS Criminal Justice Standards and Training Commission
SPONSOR(S): Dean and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 2032

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Criminal Justice Committee	8 Y, 0 N, w/CS	Kramer	Kramer
2) Criminal Justice Appropriations Committee	5 Y, 0 N	Burns	DeBeaugrine
3) Justice Council			
4)			
5)			

SUMMARY ANALYSIS

In 2004, Congress passed the "Law Enforcement Officers Safety Act of 2004". According to the act, notwithstanding any other provision of the law of any state or political subdivision, an individual who is a "qualified law enforcement officer" or "qualified retired law enforcement officer" as defined by the act and who is carrying specified identification is authorized to carry a concealed firearm. Under this act, the definition of the term "qualified retired law enforcement officer" includes a requirement that the person has met the state's standards for training and qualification for active law enforcement officers to carry firearms. Florida currently does not have a statewide standard for training and qualifications in firearms for active law enforcement officers. The Florida Department of Law Enforcement (FDLE) has issued proposed rules which would create a statewide standard for active officers but those rules are not yet in effect.

HB 669 requires the Criminal Justice Standards and Training Commission within FDLE to adopt rules establishing the manner in which the federal Law Enforcement Officers Safety Act of 2004 will be implemented in the state. The bill requires the commission to develop and authorize a uniform proficiency verification card to be issued to persons who achieve a passing score on the firing range testing component of the minimum firearms proficiency course for active law enforcement officers. The card will indicate the person's name and the date on which he or she achieved the passing score. Such a card will be issued only by firearms instructors certified by the commission.

The bill allows facilities operating firing ranges which use certified firearms instructors to open the firing range to other persons who wish to demonstrate their ability to achieve a passing score on the firing range proficiency course. All costs associated with the demonstration by any such person that he or she meets the requirements of the firing range testing component of the minimum firearms proficiency course will be at the expense of the person being tested.

The bill will have a minimal fiscal impact on state expenditures.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government: The bill requires the Criminal Justice Standards and Training Commission to develop a manner of implementing the federal Law Enforcement Officers Safety Act of 2004 which authorizes qualified law enforcement officers and qualified retired law enforcement officers to carry concealed firearms.

B. EFFECT OF PROPOSED CHANGES:

Criminal Justice Standards and Training Commission: The Criminal Justice Standards and Training Commission (CJSTC) is established within the Florida Department of Law Enforcement, pursuant to s. 943.11, F.S. It has a number of responsibilities relating to the training, certification, and discipline of law enforcement officers, correctional officers, and correctional probation officers [1] The CJSTC requires training in the use of firearms and a demonstration of proficiency in order to receive initial law enforcement officer, correctional officer or correctional probation officer certification.[2] After an officer is certified, there are no statewide standards for firearms proficiency. Firearms training and proficiency standards are then the responsibility of the employing agency.

The CJSTC also certifies individuals who provide instruction in law enforcement officer and correctional officer training courses.[3] The CJSTC certifies instructors to teach specialized topics. For example, the commission certifies vehicle operations instructors, defensive tactics instructors and firearms instructors.[4]

Concealed weapons: Section 790.01, F.S. provides that it is a first degree misdemeanor to carry a concealed weapon and a third degree felony to carry a concealed firearm. The provision does not apply to a person licensed to carry a concealed weapon or firearm. The Department of Agriculture and Consumer Services is authorized to issue licenses to carry concealed weapons or firearms to qualified persons.[5] There are a number of statutory requirements that must be met before a license can be issued including the following:

- The applicant is a resident of the United States;
- The applicant is 21 years of age or older;
- The applicant does not suffer from a physical infirmity which prevents the safe handling of a weapon or firearm;
- The applicant has not been convicted of a felony or other disqualifying offense;
- The applicant demonstrates competence by completing specified training;
- The applicant has not recently been committed to a mental institution;

Upon approval by the department and payment of an $85 fee, the applicant is issued a license card that the applicant must carry when possessing a concealed weapon or firearm. The license is valid for 5 years. Even if a person holds a concealed weapon license, there are a large number of places that the licensee is prohibited from carrying a concealed weapon or firearm.[6]

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[1] s. 943.12, F.S.
[2] See 11B-35.0024, F.A.C.
[3] S. 943.14(3), F.S.
[4] See 11B-20.0013(3)(b) and (c), F.A.C. and 11B-20.0014(2)(c) and (d), F.A.C.
[5] See generally, S. 790.06, F.S.
[6] s. 790.06(12), F.S.

A law enforcement officer, correctional officer or correctional probation officer holding active certification from the CJSTC is exempt from the above licensing requirements.[7] If off duty, the officer is required to have a license in order to carry a concealed firearm or have the permission of his or her superior officer.[8] A law enforcement, correctional or correctional probation officer who wishes to receive a concealed weapons or firearm license is exempt from the background investigation and the fees for such investigation.[9] A retired law enforcement, correctional or correctional probation officer is exempt from the required fees and background investigation for one year after his or her retirement.[10]

Currently, Florida law permits a non-resident of Florida to carry a concealed weapon or firearm within the state if he or she has a license from a state that honors Florida licenses. The Division of Licensing within the Department of Agriculture and Consumer services has established reciprocity agreements with 29 states.[11]

Law Enforcement Officers Safety Act of 2004: In 2004, Congress passed the "Law Enforcement Officers Safety Act of 2004".[12] According to the act, notwithstanding any other provision of the law of any state or political subdivision, an individual who is a "qualified law enforcement officer" and who is carrying identification issued by the officer's employing agency may carry a concealed firearm. The term qualified law enforcement officer is defined to mean an employee of a governmental agency who:[13]

> (1) is authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of, or the incarceration of any person for, any violation of law, and has statutory powers of arrest;
>
> (2) is authorized by the agency to carry a firearm;
>
> (3) is not the subject of any disciplinary action by the agency;
>
> (4) meets standards, if any, established by the agency which require the employee to regularly qualify in the use of a firearm;
>
> (5) is not under the influence of alcohol or another intoxicating or hallucinatory drug or substance; and
>
> (6) is not prohibited by Federal law from receiving a firearm.

The bill also provides that notwithstanding any state or local law, a "qualified *retired* law enforcement officer" that is carrying identification discussed further below is permitted to carry a concealed firearm.

The act defines the term "qualified retired law enforcement officer" to mean an individual who:[14]

> (1) retired in good standing from service with a public agency as a law enforcement officer, other than for reasons of mental instability;
>
> (2) before such retirement, was authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of, or the incarceration of any person for, any violation of law, and had statutory powers of arrest;

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[7] s. 790.06(5)(b), F.S.
[8] See ss. 790.052 and 790.06, F.S.
[9] s. 790.06(5)(b), F.S.
[10] s. 790.06(5)(b), F.S.
[11] http://licgweb.doacs.state.fl.us/news/concealed_carry.html
[12] H.R. 218; 18 U.S.C 926B; 18 U.S.C. 926C.
[13] 18 U.S.C. 926B(c)
[14] 18 U.S.C. 926C(c)

(3) (A) before such retirement, was regularly employed as a law enforcement officer for an aggregate of 15 years or more; or

(B) retired from service with such agency, after completing any applicable probationary period of such service, due to a service-connected disability, as determined by such agency;

(4) has a nonforfeitable right to benefits under the retirement plan of the agency;

(5) *during the most recent 12-month period, has met, at the expense of the individual, the State's standards for training and qualification for active law enforcement officers to carry firearms;*

(6) is not under the influence of alcohol or another intoxicating or hallucinatory drug or substance; and

(7) is not prohibited by Federal law from receiving a firearm.

The act specifies that the identification required to be carried by the retired law enforcement officer is:

(1) a photographic identification issued by the agency from which the individual retired from service as a law enforcement officer that indicates that the individual has, within one year before the date the individual is carrying the concealed firearm, been tested or otherwise found by the agency to meet the standards established by the agency for training and qualification for active law enforcement officers to carry a firearm of the same type as the concealed firearm; or

(2) (A) a photographic identification issued by the agency from which the individual retired from service as a law enforcement officer; and

(B) a certification issued by the State in which the individual resides that indicates that the individual has, within one year before the date the individual is carrying the concealed firearm, been tested or otherwise found by the State to meet the standards established by the State for training and qualification for active law enforcement officers to carry a firearm of the same type as the concealed firearm.

Until recently, Florida has not had a statewide standard for firearms proficiency for active law enforcement officers. The responsibility for ensuring firearms proficiency has rested with the employing law enforcement agency. According to a recent Attorney General's opinion, "retired law enforcement officers may carry concealed weapons permits pursuant to 18 U.S.C. 926C even though the state does not currently have statewide firearms training and qualifications standards for active law enforcement officers."[15] On December 30, 2005, FDLE published proposed rules which will create a statewide proficiency standard for active law enforcement officers.[16] According to FDLE, this will facilitate retired law enforcement officer's attempts to demonstrate that they fall under HR 218 because they will be able to demonstrate that they are able to pass their state's proficiency standard for active officers.[17] The rule will become effective on March 27, 2006 and beginning on July 1, 2006, law enforcement officers will be required to qualify under the new standards.

Effect of HB 669: HB 669 requires the CJSTC to adopt rules establishing the manner in which the federal Law Enforcement Officers Safety Act of 2004 will be implemented in the state. The bill requires the commission to develop and authorize a uniform proficiency verification card to be issued to persons who achieve a passing score on the firing range testing component of the minimum firearms proficiency course for active law enforcement officers. The card will indicate the person's name and the date on

[15] AGO 2005-45, August 2, 2005.
[16] Volume 31, Number 52, F.A.W. (December 30, 2005)
[17] http://www.fdle.state.fl.us/hr218/attach/hr218update-fall05.html

which he or she achieved the passing score. Such a card will be issued only by firearms instructors certified by the commission.

The bill also provides that facilities operating firing ranges for active law enforcement officers may open the firing range to other persons who wish to demonstrate their ability to achieve a passing score on the firing range proficiency course. All costs associated with the demonstration by any such person that he or she meets the requirements of the firing range testing component of the minimum firearms proficiency course will be at the expense of the person being tested.

C. SECTION DIRECTORY:

Section 1. Creates s. 943.132, F.S. to implement federal Law Enforcement Officers Safety Act of 2004.

Section 2. Provides effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   There would be a minimal indeterminate loss of revenue.

2. Expenditures:

   According to the fiscal analysis provided by FDLE, this bill will have a "negligible" fiscal impact on the agency.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

A qualified retired law enforcement officer, as this term is defined in the Law Enforcement Officers Safety Act, with a firearms proficiency verification card issued by a firearm instructor will be authorized to carry a concealed firearm without paying the fee associated with the state permit.

D. FISCAL COMMENTS:

See above.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not applicable because this bill does not appear to: require the counties or cities to spend funds or take an action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill requires the CJSTC to adopt rules relating to the carrying of concealed firearms by active and retired law enforcement officers.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

The Criminal Justice Committee amended the bill to change a reference from "range instructors" to "firearms instructors" in conformity with FDLE's administrative rules. The bill was also amended to clarify that any person who receives a passing score on the firing range testing component of the minimum firearms proficiency court for active law enforcement officers can obtain a uniform proficiency verification card.

CHAMBER ACTION

The Criminal Justice Committee recommends the following:

Council/Committee Substitute

Remove the entire bill and insert:

A bill to be entitled

An act relating to the Criminal Justice Standards and Training Commission; creating s. 943.132, F.S.; requiring the Criminal Justice Standards and Training Commission to adopt rules for the implementation of the federal Law Enforcement Officers Safety Act of 2004; requiring the commission to develop and authorize the issuance of a uniform firearms proficiency verification card; authorizing the use of specified facilities operating firing ranges for testing of persons other than law enforcement officers; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 943.132, Florida Statutes, is created to read:

943.132 Implementation of federal Law Enforcement Officers Safety Act of 2004.--

(1) The commission shall by rule establish the manner in which Title 18, 44 U.S.C. ss. 926B and 926C, the federal Law Enforcement Officers Safety Act of 2004, relating to the carrying of concealed firearms by qualified law enforcement officers and qualified retired law enforcement officers, as defined in the act, shall be implemented in the state. In order to facilitate the implementation within the state of Title 18, 44 U.S.C. ss. 926B and 926C, the commission shall develop and authorize a uniform firearms proficiency verification card to be issued to persons who achieve a passing score on the firing range testing component of the minimum firearms proficiency course for active law enforcement officers, indicating the person's name and the date upon which he or she achieved the passing score. Each such card shall be issued only by firearms instructors certified by the commission.

(2) Facilities operating firing ranges on which firearms instructors certified by the commission administer the firing range testing component of the minimum firearms proficiency course for active law enforcement officers may open the firing range under terms and conditions established by the operating entity to other persons for purposes of allowing such persons to demonstrate their ability to achieve a passing score on the firing range testing component of the minimum firearms proficiency course. All costs associated with the demonstration by any such person that he or she meets the requirements of the firing range testing component of the minimum firearms proficiency course shall be at the expense of the person being tested.

Section 2. This act shall take effect July 1, 2006.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 815 Strangulation
SPONSOR(S): Russell
TIED BILLS: **IDEN./SIM. BILLS:** SB 2150

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Criminal Justice Committee	6 Y, 0 N	Ferguson	Kramer
2) Criminal Justice Appropriations Committee	5 Y, 0 N	Sneed	DeBeaugrine
3) Justice Council			
4)			
5)			

SUMMARY ANALYSIS

This bill amends felony battery to include the act of strangulation. Currently, a battery by strangulation where there is no great bodily harm, permanent disability, or permanent disfigurement is a misdemeanor; this bill makes battery by strangulation a third degree felony. This bill defines the act of strangulation and provides an affirmative defense.

The Criminal Justice Estimating Conference met February 28, 2006 and determined that this bill would have an indeterminate prison bed impact on the Department of Corrections.

The effective date of this bill is October 1, 2006.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government / Promote Personal Responsibility- This bill provides criminal penalties for battery by strangulation.

B. EFFECT OF PROPOSED CHANGES:

Under Florida law a simple battery occurs when a person actually and intentionally touches or strikes another person against the will of the other[1] or intentionally causes bodily harm to another person.[2] The crime of felony battery[3] requires that the offender cause great bodily harm, permanent disability, or permanent disfigurement. The crime of aggravated battery[4] requires intent to cause great bodily harm, permanent disability, permanent disfigurement, or use of a deadly weapon.

Currently, Florida does not have statutes in place that specifically address strangulation unlike some other states[5]. The act of strangulation can be potentially fatal; however, non-fatal strangulations rarely cause visible injuries. Consequently, non-fatal strangulations are charged as a simple battery because a prosecutor can not establish great bodily harm, permanent disability, or permanent disfigurement. Simple battery is a first degree misdemeanor which is punishable by a term of imprisonment not exceeding 1 year[6] and a fine of $1,000.[7]

This bill amends felony battery to include the act of strangulation. This bill provides that the act of strangulation is committed by knowingly or intentionally impeding the normal breathing or circulation of the blood of the other person by applying pressure on the throat or neck or by blocking the nose or mouth of the other person. A felony battery is a third degree felony punishable by a term of imprisonment not exceeding 5 years[8] and a fine of $5,000.[9]

This bill also provides it is an affirmative defense that an act constituting strangulation was the result of a legitimate medical procedure.

C. SECTION DIRECTORY:

Section 1 amends section 784.041, F.S., to include the act of strangulation and to provide an affirmative defense.

Section 2 provides an effective date of October 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

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[1] Section 784.03(1)(a)1., F.S.
[2] Section 784.03(1)(a)2., F.S.
[3] Section 784.041, F.S.
[4] Section 784.045, F.S.
[5] *See* North Carolina State Statute § 14-32.4; State of Nebraska Statutes § 28-310.01; Missouri Revised Statutes § 565.073.
[6] Section 775.082(4)(a), F.S.
[7] Section 775.083(1)(d), F.S.
[8] Section 775.082(3)(d), F.S.
[9] Section 778.083(1)(c), F.S.

2. Expenditures:

The Criminal Justice Impact Conference met February 28, 2006 and determined this bill would have an indeterminate prison bed impact on the Department of Corrections.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

A bill to be entitled

An act relating to strangulation; amending s. 784.041, F.S.; providing that knowingly or intentionally impeding the normal breathing or circulation of the blood of another person in specified ways constitutes felony battery; providing an affirmative defense; providing penalties; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 784.041, Florida Statutes, is amended to read:

784.041 Felony battery.--

(1) A person commits felony battery if he or she:

(a) Actually and intentionally touches or strikes another person against the will of the other; and

(b)1. Causes great bodily harm, permanent disability, or permanent disfigurement; or

2. Commits the act of strangulation by knowingly or intentionally impeding the normal breathing or circulation of the blood of the other person by applying pressure on the throat or neck or by blocking the nose or mouth of the other person. It is an affirmative defense to a charge under this subparagraph that an act constituting strangulation was the result of a legitimate medical procedure.

(2) A person who commits felony battery commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Section 2. This act shall take effect October 1, 2006.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 839 CS Homeowners' Associations
SPONSOR(S): Kottkamp; Baxley; Davis, D.; Ross; Zapata
TIED BILLS: None **IDEN./SIM. BILLS:** SB 2358

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee	5 Y, 0 N, w/CS	Blalock	Bond
2) Judiciary Committee	12 Y, 0 N, w/CS	Thomas	Hogge
3) Economic Development, Trade & Banking Committee	10 Y, 0 N, w/CS	Olmedillo	Carlson
4) Justice Council			
5)			

SUMMARY ANALYSIS

A homeowners' association is a corporation responsible for the operation of a community in which voting membership is made up of parcel ownership and in which membership is a mandatory condition of parcel ownership, and which is authorized to impose assessments that, if unpaid, may become a lien on the parcel.

This bill increases the regulation of homeowners' associations and establishes conformity in the laws regulating homeowners' associations and condominium associations by:

- Revising the requirements for the inspection and copying of records;
- Revising what must be included in the associations' annual budget;
- Revising the financial reporting requirements; and
- Providing for guarantees of common expenses when they are not included in the declaration.

This bill also eliminates mediation of disputes between homeowners' associations and members from the jurisdiction of the Department of Business of Professional Regulation. The mandatory mediation of such disputes will have to be conducted by private mediators.

The bill also extends the deadline for the installation of fire sprinklers in condominiums.

The bill places limits on a homeowner association's ability to enforce any policy that is inconsistent with the rights and privileges of a parcel owner set forth in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants, whether the policy is uniformly applied or not.

The bill appears to have a minimal negative fiscal impact on state revenues. This bill does not appear to have a fiscal impact on local governments.

The bill takes effect on July 1, 2006.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Limited Government: This bill increases regulation of homeowners' associations. This bill eliminates the current requirement that certain disputes between homeowners and homeowners associations be referred to the Department of Business and Professional Regulation for assignment of a mediator.

Safeguard Individual Liberty: This bill decreases restrictions on condominium associations when amending declarations of condominium, articles of incorporation, or bylaws. This bill increases the power of parcel owners in making improvements under architectural control covenants.

B. EFFECT OF PROPOSED CHANGES:

Background

A homeowners' association is an entity responsible for the operation of a community or mobile home subdivision in which voting membership is made up of parcel ownership and in which membership is a mandatory condition of parcel ownership, and which is authorized to impose assessments that, if unpaid, may become a lien on the parcel.[1] Homeowners' associations are regulated under ch. 720, F.S.

The purposes of the statutory provisions relating to homeowners' associations are to give statutory recognition to corporations that operate residential communities in Florida, to provide procedures for operating a homeowners' association, and to protect the rights of association members without unduly impairing the ability of the association to perform its functions.[2]

Homeowners' associations were first regulated by statute in 1992 when laws regarding homeowners' associations were placed in ch. 617, F.S., which chapter regulates not for profit corporations.[3] By placing the regulation in a chapter that regulates corporations, the implication was that a homeowners' association must be incorporated; however, this was not specifically required. In 1995, the regulation was amended to specifically require that an association be incorporated, and that the initial governing documents of the association be recorded in the public records.[4] In 2000, the regulation of homeowners' associations was moved out of the chapter on not for profit corporations, and into its own chapter, ch. 720, F.S.

Section 720.303, F.S., regulates several aspects of a homeowners' association including the powers and duties of the association, the association budget, and financial reporting requirements.

Currently, s. 720.303(1), F.S., provides that a homeowners' association must be operated by an association that is a Florida corporation, and provide that after October 1, 1995, the association must be incorporated and the initial governing documents of an association must be recorded in the official records of the county in which the community is located.[5] "Governing documents" means the recorded declaration of covenants for a community and all duly adopted and recorded amendments, supplements, and recorded exhibits,[6] the articles of incorporation and bylaws of the homeowners'

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[1] Section 720.301(9), F.S.
[2] Section 720.302(1), F.S.
[3] See sections 33 through 39 of ch. 92-49, L.O.F.
[4] See section 54 of ch. 95-274, L.O.F.
[5] Section 720.303(1), F.S.
[6] Section 720.303(6)(a), F.S.

association and any adopted amendments.[7] It appears that associations created before October 1, 1995 are grandfathered in and thus are not required to be incorporated in Florida and are not required to record their governing documents in the public records. Section 720.303(1), F.S., also provides that an association may operate more than one community.

Effect of Bill

Covenant Revitalization

Proposed Changes

The bill provides that a homeowner's association not otherwise subject to chapter 720 may use the procedures set forth in ss. 720.403 - 720.407 to revive covenants that have lapsed under the terms of chapter 712.

Pre-emption

The bill pre-empts local governments from restricting a unit owner, an association's guests, licensees, members or invitees to use or access their units or common elements for the purpose of accessing a public beach or private beach adjacent to the condominium.

Condominium Associations

Amendments to Condominium Documents

Current Law

Section 718.110(11), F.S., provides that any declaration of condominium recorded after April 1, 1992, may not require the consent or joinder of mortgagees in order for an association to pass an amendment to the declaration. This is limited to amendments which do not materially affect the rights or interests of the mortgagees, or as otherwise required by the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation. Current law provides that such consent may not be unreasonably withheld. In the event mortgagee consent is provided other than by properly recorded joinder, such consent must be evidenced by affidavit of the association recorded in the public records of the county where the declaration is recorded.[8]

Proposed Changes

The bill provides that the state has a compelling interest in enabling the members of a condominium association to approve amendments to the documents through legal means as follows:

- As to any mortgage recorded only on or after October 1, 2006, any provision in the condominium documents that requires the consent or joinder of some or all mortgagees of any portion of the condominium property, including mortgagees of units, to amend any such documents or for any other matter shall be enforceable only as to the following matters:
    - Amendments regarding the configuration or size of any unit in any material fashion, a material alteration or modification of the appurtenances to the unit or change in the proportion or percentage by which the unit owner shares the common expenses of the condominium and owns the common surplus of the condominium;
    - Amendments to the declaration permitting the creation of timeshare estates in any unit; and
    - Amendments that materially affect the rights and interests of the mortgagees;

[7] Section 720.303(6)(b), F.S.
[8] Section 718.110(11), F.S.

- In securing required consents or joinders, the association shall be entitled to rely on the recorded mortgage, assignment or modification of record. In addition, the association shall, in writing, request each unit owner/mortgagor the name and address of the person to whom mortgage payments are currently being made, and send a notice to such address if it differs from the one listed in the public record.
- The association shall send all required notices under this paragraph to all available addresses and it shall be deemed to have complied with this requirement if it makes a request of the unit owners/mortgagors in writing.
- The association shall send all required notices by a method that establishes proof of delivery and any mortgagee who fails to respond within 60 days after the date of mailing shall be deemed to have consented to the amendment.
- Any amendment adopted without the required consent or joinder and without the required notice and opportunity to consent, shall be voidable within 5 years from discovery of an amendment that materially affects the rights and interest of the mortgagee, or within 5 years from the time of recordation of such amendment. This provision of the bill applies to all mortgages regardless of its date of recordation.

The bill extends the opportunity of a condominium association to comply with the completion of retrofitting common areas with a sprinkler system from 2014 to 2025.

Condominium Association's Powers

The bill defines that a material alteration or substantial addition to the association's real property includes any agreements acquiring leaseholds, memberships, or other possessory or use interests entered into 12 months following the recording of the declaration.

Mixed-Use Condominiums

Current Law

Section 718.404, F.S, pertains to mixed-use condominiums, which are condominiums where there are both residential and commercial units. Section 718.404(1), F.S., provides that for mixed-use condominiums, the owner of a commercial unit does not have the authority to veto amendments to the declaration, articles of incorporation, bylaws, or rules or regulations of the association. Section 718.404(2), F.S., is also amended to provide that when the number of residential units is equal to or greater than 50% of the total number of units operated by the association, owners of the residential units are entitled to vote for a majority of the seats on the board of administration.

Proposed Changes

This bill amends subsections (1) and (2) of s. 718.404, F.S., to provide that these subsections are intended to be applied retroactively as a remedial measure.

Cooperatives

The bill provides a definition of "equity facilities club" applicable to ch. 719 (Cooperatives), to mean:

> A club comprised of recreational facilities in which proprietary membership interests are sold to individuals, which membership interests entitle the individuals to use certain physical facilities owned by the equity club. Such physical facilities do not include a residential unit or accommodation. For purposes of this definition, the term "accommodation" shall include, but is not limited to, any apartment, residential cooperative unit, residential condominium unit, cabin, lodge, hotel or motel room, or any other accommodation designed for overnight occupancy for one or more individuals.

The bill also extends current limitations related to zoning and building laws, ordinances and regulations concerning cooperatives, to include equity facilities club form of ownership.

Homeowner's Associations

Current Law

Current law regulates homeowner associations in ch. 720, F.S., and s. 720.302, F.S., provides that ch. 720, F.S. does not apply to condominium associations. This bill amends s. 720.302, F.S., to provide an exception to the current law providing that chapter 720, which regulates homeowners' associations, does not apply to condominium associations.

Proposed Changes

The bill provides an exception for the non-applicability of chapter 720 to associations that are subject to regulation pursuant to chapters 718, 719 or 721, or 723, to the extent that a provision of chapters 718, 719, or 721 is expressly incorporated into ch. 720 for the purpose of regulating homeowner's association.

The bill clarifies which law applies to corporations that operate residential homeowner's associations, according to the chapter under which it was incorporated. Moreover, the bill allows homeowner associations to incorporate as "for-profit" corporations.

Homeowner's Association Board Meetings

Current Law

Section 720.303(2), F.S., provides procedures for association board meetings. A meeting of the board occurs whenever a quorum of the board gathers to conduct association business. Board meetings are open to all members, except for those meetings between the board and its attorney relating to proposed or pending litigation. Members also have the right to attend all board meetings and speak on any matter on the agenda for at least 3 minutes.

Notice of a board meeting must be posted in a conspicuous place in the community at least 48 hours prior to a meeting, except in an emergency. If notice of the board meeting is not posted in a conspicuous place, then notice of the board meeting must be mailed or delivered to each association member at least 7 days prior to the meeting, except in an emergency. For associations that have more than 100 members, the bylaws may provide for a reasonable alternative to this posting or mailing requirement. These alternatives include publication of notice, provision of a schedule of board meetings, conspicuous posting and repeated broadcasting of a notice in a certain format on a closed-

circuit cable television system serving the association, or electronic transmission if the member consents in writing to such transmission.[9]

A board may not levy assessments at a meeting unless the notice of the meeting includes the nature of those assessments and a statement that the assessments will be considered at the meeting.[10]

Directors may not vote by proxy or by secret ballot at board meetings, except that secret ballots may be used in the election of officers. This also applies to meetings of any committee or similar body when a final decision will be made regarding the spending of association funds. Proxy voting or secret ballots are also not allowed when a final decision will be made on approving or disapproving architectural decisions with respect to a specific parcel of residential property owned by a member of the community.[11]

Proposed Changes

The bill specifies that the provisions of the subsection related to condominium board meetings shall also apply to the meetings of any committee or other similar body when a final decision will be made regarding the expenditure of association funds and to meetings of any body vested with the power to approve or disapprove architectural decisions with respect to a specific parcel of residential property owned by a member of the community.

Homeowners' Association Inspection and Copying of Records

Current Law

Section 720.303(5), F.S., requires that a homeowners' association allow its members to inspect and copy its official records within 10 days of a written request for access. A failure to comply with such a request in a timely fashion creates a rebuttable presumption that the association failed to do so, and entitles the requesting party to actual damages, or to a minimum of $50 per calendar day, commencing on the eleventh business day. A homeowners' association may adopt reasonable written rules governing the frequency, time, location, notice, records to be inspected, and manner of inspections, but may not impose a requirement that a parcel owner demonstrate any proper purpose for the inspection, state any reason for the inspection, or limit a parcel owner's right to inspect records less than one 8-hour business day per month. The association may impose fees to cover the costs of providing copies of the official records, including without limitation, the costs of copying. The association may charge up to 50 cents per page for copies made on the associations copy machine. If the association does not have a copy machine available where the records are kept, or if the records requested to be copied exceed 25 pages, then the association may have copies made by an outside vendor and may charge the actual cost of copying.

Current law expressly exempts the following from inspection by a member or parcel owner: any record protected by attorney-client or work-product privilege; information obtained in association with the lease, sale or transfer of a parcel that is otherwise privileged by state or federal law; disciplinary, health, insurance and personnel records of the association's employees; or medical records of parcel owners or other community residents.[12]

Proposed Changes

The bill provides that an association is not required to provide prospective purchasers or lienholders any information related to the residential subdivision or the association, unless such information is required by chapter 720. Moreover, the bill authorizes the association to charge a reasonable fee, not

[9] Section 720.303(2)(c)1, F.S.
[10] Section 720.303(2)(c)2, F.S.
[11] Section 720.303(2)(c)3, F.S.
[12] Section 720.303(1), (2), (3), (4), F.S.

to exceed $150 plus reasonable cost of copies and attorney's fees associated with the response, to the prospective purchaser, lienholder, parcel owner or member for providing responses to requests for information, other than those required by law.

Homeowners' Association Budgets

Current Law

Section 720.303(6), F.S., provides that an association must prepare an annual budget.

Proposed Change

This bill amends s. 720.303(6), F.S., to require that:

- The annual budget provide for the annual operating expenses and the budget must set out all fees or charges paid for by the association.
- The annual budget may include reserve accounts for capital expenditures and deferred maintenance for which the association is responsible to the extent that the association's governing documents do not limit increases in assessments.
- If the budget of the association does not provide for reserve accounts and the association is responsible for the repair and maintenance of capital improvements that may result in special assessments if reserves are not provided, each financial report for the preceding fiscal year must contain a statement in conspicuous type as provided by the bill.
- An association is deemed to have provided for reserve accounts when reserve accounts have been initially established by the developer or when the membership of the association affirmatively elects to provide for reserves. Once established, the reserve accounts must be funded, maintained or waived.
- The amount to be reserved must be computed by using a formula that is based upon estimated remaining useful life and estimated replacement cost or deferred maintenance expense of each reserve item.
- Once a reserve account or reserve accounts are established, the membership of the association may provide for no reserves or less reserves.
- After the turnover, a developer may vote its voting interest to waive or reduce the funding of reserves.
- Reserve funds and any interest shall remain in the reserve account, and may be used only for authorized reserve expenditures.
- Prior to turnover of control of an association by a developer to parcel owners, the developer-controlled association may not vote to use reserves for purposes other than that for which they were intended without the approval of a majority of all non-developer voting interests.

Homeowners' Association Financial Reporting

Current Law

Section 720.303(7), F.S., requires homeowners' associations to prepare an annual financial report within 60 days after the close of the fiscal year. The association must provide each member with a copy of the annual financial report or a written notice that a copy of the financial report is available upon request at no charge to the member.

Proposed Changes

This bill amends s. 720.303(7), F.S., to increase from 60 to 90 days the time that an association has to prepare and complete an annual financial report after the close of the fiscal year. Within 21 days after the final financial report is completed by the association, but no later than 120 days after the end of the fiscal year, the association must provide each member with a copy of the annual financial report. Homeowners' associations and condominium associations are generally operated and managed the same way, and the language used in this bill is identical in form to language contained in s. 718.111(13), F.S., regarding financial reporting for condominium associations.

This bill amends s. 720.303(7)(a), F.S., to provide that financial statements are to be completed in accordance with the accounting principles adopted by the Florida Board of Accountancy.

Architectural Control Covenants; Parcel Owner Improvements; Rights and Privileges

Proposed Changes

This bill creates s. 720.3035, F.S., to provide that:

- An association may review and approve plans and specifications for the location, size, type or appearance of any structure, or enforce such standards, only to the extent as specifically stated or reasonably inferred in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants.
- An association may only restrict the right of a parcel owner to select from options for the use of material, the size or design of the structure or improvement, or the location of the structure or improvement on the parcel, as provided in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants.
- Unless specifically stated in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants, each parcel may be deemed to have only one front for purposes of determining the required front setback. When the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants does not provide for specific setback lines, the applicable county or municipal setback lines shall apply.
- Each parcel owner is entitled to the rights and privileges provided in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants concerning the use of the parcel, and the construction of permitted structures and improvements on the parcel and such rights and privileges shall not be unreasonably impaired by the association.
- An association may not enforce any policy that is inconsistent with the rights and privileges of a parcel owner set forth in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants, whether the policy is uniformly applied or not.

Remedies at law or in equity

Current Law

Section 720.305, F.S., provides that the association or member may file an action at law and/or in equity to redress the alleged failure or refusal to comply with ch. 720, the governing documents of the community and the rules of the association. In addition, the law provides that the prevailing party is entitled to attorney's fees and costs.

Proposed Changes

This bill provides that in an action between a member and the association, a court may order an association to reimburse a member for his or her share of assessments the association levied to fund its expenses of the litigation.

Homeowners' Association Budgets

Current Law

Section 720.306, F.S., provides that generally, an amendment may not materially and adversely alter the proportionate voting interest appurtenant to a parcel or increase the proportion or percentage by which a parcel shared in the common expenses of the association.

Proposed Changes

This bill specifies that a merger or consolidation of one or more associations under a plan or merger or consolidation under chapter 607 or chapter 617 shall not be considered a material or adverse alteration of the proportionate voting interest appurtenant to a parcel.

Transition of Homeowners' Association Control

Current Law

Section 720.307, F.S., provides procedures for turning over control of an association from the developer to parcel owners. The transition of association control begins with the election of the board of directors of the homeowners' association by the members. At the time the members elect a majority of the board of directors, the developer must deliver various documents to the board.

Proposed Changes

This bill amends s. 720.307, F.S., to include additional documents the developer must provide to the board of directors. Along with the documents that must be provided by the developer under current law, this bill requires that the developer also provide the board of directors the financial records, including the statements of the association, and source documents from the incorporation of the association through the date of turnover. This bill also provides that an independent certified public accountant must audit the records and determine that the developer was charged with, and paid, the proper amounts of assessments.

The language in this section of the bill is taken from language found in s. 718.301(4)(c), F.S., of the Condominium Act. The current law for homeowners' associations pertaining to transition of association control is very similar to the current condominium act and this bill provides conformity between the homeowners' associations and the condominium associations.

The provisions added by this section of the bill apply only to associations incorporated after December 31, 2006.

Guarantees of Common Expenses

Current Law

The developer of a community is responsible for paying the costs of the common expenses of the community until the sale of the parcels to a purchaser in which time the developer pays a proportionate share of the common expenses with the parcel owners. Condominium law allows a developer to be excused from payment of common expenses if the common expenses of all unit owners are guaranteed not to increase and the developer agrees to pay all common expenses incurred but not covered by unit owner payments during the period of the guarantee.[13]

Proposed Changes

This bill amends s. 720.308, F.S., to provide for the guarantee of assessments if a guarantee is not included in the purchase contract or declaration. This bill provides that a guarantee is effective only upon approval of a majority of the voting interests of the members other than the developer. This bill also provides that:

- The time period of a guarantee must have a specific beginning and ending date or event;
- The dollar amount of the guarantee must be an exact dollar amount for each parcel identified in the declaration;
- The cash payments required from the developer must be paid when the revenue collected by the association is not sufficient to provide payment for all assessments; and,
- The expenses incurred in the production of non-assessment revenues, not in excess of the non-assessment revenues, must not be included in the assessments. If expenses attributable to non-assessment revenues exceed non-assessment revenues, then the guarantor must only fund the excess expenses.

Dispute Resolution

Current Law

Section 720.311, F.S., established dispute resolution procedures for homeowners' associations and their members. Current law requires that recall disputes must be resolved by binding arbitration conducted by the Department of Business and Professional Regulation (DBPR).

Proposed Changes

The bill deletes the mandatory mediation requirement through the Department of Business and Professional Regulation (DBPR) and it provides that DBPR is no longer responsible for certification programs for mediators or education programs for homeowner's associations.

The bill includes pre-suit mediation, rather than a petition for mediation, as a form of dispute resolution authorized under chapter 720 for certain disputes and it provides for a number of required procedures and forms. However, it authorizes a party to file a motion for temporary injunctive relief with the court prior to complying with presuit mediation requirements; thereafter, the court shall require that the parties attend in mediation. The bill removes the requirement that the mediator be certified by DBPR and states that a certified mediator or arbitrator is one that has been certified as a circuit court civil mediator or arbitrator respectively.

The bill requires that an aggrieved party serve on the responding party, by certified mail, return receipt requested, a written offer (Statutory Offer to Participate in Presuit Mediation) to participate in presuit mediation substantially similar to the form the bill provides.

The Statutory Offer to Participate in Presuit Mediation form includes a detailed description of the required procedures and rules for presuit mediation and provides the responding party an opportunity to agree or waive mediation within 20 days from the date of mailing.

[13] Section 718.116, F.S.

The bill also provides for events and actions which will result in an impasse.

The bill provides that in an arbitration or litigation subsequent to a presuit mediation to resolve unsettled issues or enforce a mediation settlement, a prevailing party may recover attorney's fees incurred in the presuit mediation process.

C. SECTION DIRECTORY:

Section 1 amends s. 712.11, F.S., relating to homeowners' associations' covenant revitalization.
Section 2 amends s. 718.106, F.S., relating to condominium parcels, appurtenances, possession and enjoyment.
Section 3 amends s. 718.110, F.S., relating to amendments to declarations.
Section 4 amends s. 718.112, F.S., relating to a condominium's bylaws.
Section 5 amends s. 718.114, F.S., relating to a condominium association's powers.
Section 6 amends s. 718.404, F.S., relating to mixed-used condominiums.
Section 7 amends s. 719.103, F.S., creating a definition for equity facilities club.
Section 8 amends s. 719.507, F.S., relating to zoning and buildings laws, ordinances, and regulations in regards to cooperatives.
Section 9 amends s. 720.302, F.S., relating to the purpose, scope and applicability of ch. 720.
Section 10 amends s. 720.303, F.S., relating to association powers and duties.
Section 11 repeals subsection (2) of s. 720.303, F.S., as amended by section 2 of chapter 2004-345 and section 15 of chapter 2004-353, Laws of Florida, relating to a homeowner's association's board meetings.
Section 12 creates s. 720.3035, F.S., relating to architectural control covenants and parcel owner improvements.
Section 13 amends s. 720.305, F.S., relating to available remedies.
Section 14 amends s. 720.306, F.S., relating to amendments and quorum.
Section 15 amends s. 720.307, F.S., relating to the transition of association control.
Section 16 amends s. 720.308, F.S., relating to assessments and charges by the association.
Section 17 amends s. 720.311, F.S. relating to dispute resolution.
Section 18 provides an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

DBPR estimates that this bill will result in a reduction of $126,018 in mediation filing fees and expenses received by the DBPR. It will also result in a reduction of $9,199 in service charges provided to General Revenue.[14]

The DBPR's reassignment of the staff who have been conducting both homeowner's association and condominium mediations to condominium mediations full-time as described in "Expenditures", below, will not result in additional revenues because unlike in the homeowner's association mediation program, the condominium mediation program does not charge for the cost of the mediation.

2. Expenditure:

DBPR will experience decreased workload as a result of no longer being required to perform homeowner association mediations. The department states, however, that it did not receive additional FTE's to perform homeowner's association mediations when the DBPR was originally assigned those responsibilities in FY 2004-05. The staff who have been conducting homeowner's

[14] The fiscal impact on state government was provided by Matilde Phillips of the Department of Business and Professional Regulation on April 3, 2006.

association mediations also perform condominium mediations and the DBPR states they would return to those responsibilities full-time.

According to the Legislative Analysis Form provided by DBPR, "The change from mandatory mediation of homeowner's association disputes to voluntary mediation and the stated ability of an association to file the dispute in the court for injunctive relief instead of using the alternate pre-suit offer to participate in mediation may make it less likely that disputes will be mediated before filing in court." This may result in increased court filings. Currently, the department allows request for emergency injunctive relief to be filed in the courts prior to exhausting the mediation process on a case-by-case basis." During the roughly 12-month period from October 1, 2004 through November 22, 2005, the DBPR states that it received 1,007 petitions for mediation. Approximately 560 or 56% of these were settled and did not result in court filings.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   The bill does not appear to have any impact on local government revenues.

2. Expenditures:

   The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill requires that a certified public accountant audit the financial records at the time the members are entitled to elect at least a majority of the board of directors of the homeowners' association. It is unclear in the bill whether the developer or the members of the association are responsible for the cost of the audit. The cost of such an audit cannot be estimated as it would depend on the amount of time and effort required.

This bill may allow increased costs to purchasers or sellers of homes in a homeowner's association since the association may charge a fee for providing information requested by prospective purchasers. The fee cannot exceed $150 plus the reasonable cost of photocopying and any attorney's fees incurred by the association in connection with the response.

The bill provides for the recovery of costs and reasonable attorney's fees in regard to litigation between a condominium association and a lender with regard to whether consent has been improperly or unreasonably withheld for proposed amendments to declaration of condominium, articles of incorporation, or bylaws.

This bill amends s. 720.305, F.S., to provide that any member who prevails against an association and is awarded attorney's fees may also be awarded an amount sufficient to cover the member's pro-rata portion of those fees.

It is unclear whether this bill will increase or decrease the cost to homeowners and homeowner's associations relating to mediation of disputes. Under current law, a fee of $200 is charged for filing to hear a dispute. Some such disputes are mediated by the Department of Business and Professional Regulation at a cost as is necessary to cover all DBPR expenses incurred in the mediation. From October 1, 2004, through November 22, 2005, for the 63 cases mediated by the DBPR, the average cost was $783 per case. However, during this period of time, the DBPR referred the vast majority of cases (93%) to private mediators whose fees were paid by the parties. This bill eliminates the $200 fee and the DBPR's provision of this service but provides for private mediation, if pursued, at a cost to be negotiated between the parties.

Additionally, according to the DBPR, the bill's requirement that private mediators for homeowner's association disputes be certified in circuit court mediation would mean that those mediators certified to

mediate county court disputes would no longer be eligible to conduct homeowner's association disputes.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to require counties or cities to: spend funds or take action requiring the expenditure of funds; reduce the authority of counties or cities to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or cities.

2. Other:

This bill may implicate the Contract Clause of the Florida Constitution, since many of the changes in this bill apply to existing associations. Article I, Section 10 of the Florida Constitution provides: "[n]o bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed."[15]

"A statute contravenes the constitutional prohibition against impairment of contracts when it has the effect of rewriting antecedent contracts, that is, of changing the substantive rights of the parties to existing contracts."[16] The Supreme Court of Florida held that laws impairing contracts can be unconstitutional if they unreasonably and unnecessarily impair the contractual rights of citizens.[17] The Court indicated that the "well-accepted" principle in this state is that virtually no degree of contract impairment is tolerable.[18] When seeking to determine what level of impairment is constitutionally permissible, a court "must weigh the degree to which a party's contract rights are statutorily impaired against both the source of authority under which the state purports to alter the contractual relationship and the evil which it seeks to remedy."[19]

B. RULE-MAKING AUTHORITY:

None. However, the bill may require the repeal of Ch. 61B-82, F.A.C., containing the mediation rules of procedure.

C. DRAFTING ISSUES OR OTHER COMMENTS:

This bill requires that a certified public accountant audit the financial records at the time the members are entitled to elect at least a majority of the board of directors of the homeowners' association. It is unclear in the bill whether the developer or the members of the association are responsible for the cost of the audit.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

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[15] Article 1, Section 10(1) of the U.S. Constitution provides: "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . . "

[16] 10a Fla. Jur. s. 414, Constitutional Law. The term impair is defined as "to make worse; to diminish in quantity, value, excellence, or strength; or to lessen in power or weaken." 10a Fla. Jur. s. 414, Constitutional Law.

[17] *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So. 2d 774 (Fla. 1979). The Florida Supreme Court has adopted the method of analysis from the United States Supreme Court in cases involving the contract clause. *Pomponio*, 378 So. 2d at 780.

[18] *Pomponio*, 378 So. 2d at 780.

[19] *Id.*

CIVIL JUSTICE COMMITTEE

On March 8, 2006, the Civil Justice Committee adopted one amendment to this bill. The amendment revises s. 720.308, F.S., by adding titles and rearranging the paragraphs and sub-paragraphs in order to clarify the bill. The bill was then reported favorably with a committee substitute.

JUDICIARY COMMITTEE

On March 22, 2006, the Judiciary Committee adopted one amendment to this bill. The amendment differs from the bill by creating a new section of Florida Statutes to specifically address architectural control covenants and parcel owner improvements. This section also authorizes the review and approval of plans and specifications and provides for rights and privileges of parcel owners as set forth in the declaration of covenants.

The amendment also provides reference to the Florida Board of Accountancy for the generally accepted accounting principles; provides that reserves are not mandatory; and provides that the waiver of reserves requires a majority vote at a meeting of the association in which a quorum is present.

Finally, the amendment provides that the provisions addressing turnover audits would apply to associations with a date of incorporation after December 31, 2006.

ECONOMIC DEVELOPMENT, TRADE & BANKING COMMITTEE

On April 5, 2006, the Economic Development, Trade & Banking Committee adopted a strike-all amendment and two amendments to the strike-all that made the following changes:

Strike-all

- The amendment consolidates the provisions of the original bill relating to the authority of the board of directors to review and approval architectural improvements into a single new section in Chapter 720.

- The amendment makes technical changes to Chapter 720 to correct duplicate portions of the Chapter enacted in 2004.

- The amendments also permits communities without a mandatory homeowners' association to revitalize their covenants; it simplifies the amendment process for condominium associations when mortgagee consents are required; it will permit condominium unit owners to vote on country club memberships before the board can impose mandatory fees on the owners; it extends the installation deadline for the installation of fire sprinklers in condominiums; it will clarify the legislature policy concerning participation by residential unit owners in mixed use condominiums; it will permit a prevailing homeowner to recover fees when they are successful in a law suit against their homeowners' association; and it modifies the pre-suit mediation process and removes it from the supervision of the Division of Lands Sales, Condominiums and Mobile Homes.

Amendment #1

- Clarifies that condominium unit owners have the right of access to public beaches adjacent to the condominium like all other private landowners in Florida.

Amendment #2

- Extends the non-discrimination provisions of the Cooperative Act to non-residential cooperatively owned equity clubs and provides for a narrow and specific definition of what qualifies as a cooperative equity club.

The bill was then reported favorably with a committee substitute.

CHAMBER ACTION

The Economic Development, Trade & Banking Committee recommends the following:

Council/Committee Substitute

Remove the entire bill and insert:

A bill to be entitled

An act relating to community associations; creating s. 712.11, F.S.; providing for the revival of certain covenants that have lapsed; amending s. 718.106, F.S.; prohibiting local ordinances that limit the access of certain persons to beaches that adjoin condominiums; amending s. 718.110, F.S.; revising provisions relating to the amendment of declarations; providing legislative findings and a finding of compelling state interest; providing criteria for consent to an amendment; requiring notice regarding proposed amendments to mortgagees; providing criteria for notification; providing for voiding certain amendments; amending s. 718.112, F.S.; revising the implementation date for retrofitting of common areas with a sprinkler system; amending s. 718.114, F.S.; providing that certain leaseholds, memberships, or other possessory or use interests shall be considered a material alteration or substantial addition to certain real

property; amending s. 718.404, F.S.; providing retroactive application of provisions relating to mixed-use condominiums; amending s. 719.103, F.S.; providing a definition; amending s. 719.507, F.S.; prohibiting laws, ordinances, or regulations that apply only to improvements that are or may be subjected to an equity club form of ownership; amending s. 720.302, F.S.; revising governing provisions relating to corporations that operate residential homeowners' associations; amending s. 720.303, F.S.; revising application to include certain meetings; requiring the association to provide certain information to prospective purchasers or lienholders; authorizing the association to charge a reasonable fee for providing certain information; requiring the budget to provide for annual operating expenses; authorizing the budget to include reserve accounts for capital expenditures and deferred maintenance; providing a formula for calculating the amount to be reserved; authorizing the association to adjust replacement reserve assessments annually; authorizing the developer to vote to waive the reserves or reduce the funding of reserves for a certain period; revising provisions relating to financial reporting; revising time periods in which the association must complete its reporting; repealing s. 720.303(2), F.S., as amended, relating to board meetings, to remove conflicting versions of that subsection; creating s. 720.3035, F.S.; providing for architectural control covenants and parcel owner improvements; authorizing the review and approval of

plans and specifications; providing limitations; providing rights and privileges for parcel owners as set forth in the declaration of covenants; amending s. 720.305, F.S.; providing that, where a member is entitled to collect attorney's fees against the association, the member may also recover additional amounts as determined by the court; amending s. 720.306, F.S.; providing that certain mergers or consolidations of an association shall not be considered a material or adverse alteration of the proportionate voting interest appurtenant to a parcel; amending s. 720.307, F.S.; requiring developers to deliver financial records to the board in any transition of association control to members; requiring certain information to be included in the records and for the records to be prepared in a specified manner; amending s. 720.308, F.S.; providing circumstances under which a guarantee of common expenses shall be effective; providing for approval of the guarantee by association members; providing for a guarantee period and extension thereof; requiring the stated dollar amount of the guarantee to be an exact dollar amount for each parcel identified in the declaration; providing payments required from the guarantor to be determined in a certain manner; providing a formula to determine the guarantor's total financial obligation to the association; providing that certain expenses incurred in the production of certain revenues shall not be included in the operating expenses; amending s. 720.311, F.S.; revising provisions relating to dispute

resolution; providing that the filing of any petition for arbitration or the serving of an offer for presuit mediation shall toll the applicable statute of limitations; providing that certain disputes between an association and a parcel owner shall be subject to presuit mediation; revising provisions to conform; providing that temporary injunctive relief may be sought in certain disputes subject to presuit mediation; authorizing the court to refer the parties to mediation under certain circumstances; requiring the aggrieved party to serve on the responding party a written offer to participate in presuit mediation; providing a form for such offer; providing that service of the offer is effected by the sending of such an offer in a certain manner; providing that the prevailing party in any subsequent arbitration or litigation proceedings is entitled to seek recovery of all costs and attorney's fees incurred in the presuit mediation process; requiring the mediator or arbitrator to meet certain certification requirements; removing a requirement relating to development of an education program to increase awareness of the operation of homeowners' associations and the use of alternative dispute resolution techniques; providing effective dates.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 712.11, Florida Statutes, is created to read:

712.11 Covenant revitalization.--A homeowners' association not otherwise subject to chapter 720 may use the procedures set forth in ss. 720.403-720.407 to revive covenants that have lapsed under the terms of this chapter.

Section 2. Subsection (5) is added to section 718.106, Florida Statutes, to read:

718.106 Condominium parcels; appurtenances; possession and enjoyment.--

(5) A local ordinance or regulation may not establish any limitation on the ability of unit owners or an association to permit guests, licensees, members, or invitees to use or access their units or common elements for the purpose of accessing a public beach or private beach adjacent to the condominium.

Section 3. Effective October 1, 2006, subsection (11) of section 718.110, Florida Statutes, is amended to read:

718.110 Amendment of declaration; correction of error or omission in declaration by circuit court.--

(11) The Legislature finds that the procurement of mortgagee consent to amendments that do not affect the rights or interests of mortgagees is an unreasonable and substantial logistical and financial burden on the unit owners and that there is a compelling state interest in enabling the members of a condominium association to approve amendments to the condominium documents through legal means. Accordingly, and notwithstanding any provision to the contrary contained in this section:

(a) As to any mortgage recorded on or after October 1, 2006, any provision in the declaration, articles of

incorporation, or bylaws that requires ~~recorded after April 1, 1992, may not require~~ the consent or joinder of some or all mortgagees of units or any other portion of the condominium property to or in amendments to the declaration, articles of incorporation, or bylaws or for any other matter shall be enforceable only as to the following matters: ~~unless the requirement is limited to amendments materially affecting the rights or interests of the mortgagees, or as otherwise required by the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation, and unless the requirement provides that such consent may not be unreasonably withheld. It shall be presumed that, except as to~~

1. Those matters described in subsections (4) and (8).~~,~~

2. Amendments to the declaration, articles of incorporation, or bylaws that adversely affect the priority of the mortgagee's lien or the mortgagee's rights to foreclose its lien or that otherwise materially affect the rights and interests of the mortgagees.

(b) As to mortgages recorded before October 1, 2006, any existing provisions in the declaration, articles of incorporation, or bylaws requiring mortgagee consent shall be enforceable.

(c) In securing consent or joinder, the association shall be entitled to rely upon the public records to identify the holders of outstanding mortgages. The association may use the address provided in the original recorded mortgage document, unless there is a different address for the holder of the mortgage in a recorded assignment or modification of the

mortgage, which recorded assignment or modification must reference the official records book and page on which the original mortgage was recorded. Once the association has identified the recorded mortgages of record, the association shall, in writing, request of each unit owner whose unit is encumbered by a mortgage of record any information the owner has in his or her possession regarding the name and address of the person to whom mortgage payments are currently being made. Notice shall be sent to such person if the address provided in the original recorded mortgage document is different from the name and address of the mortgagee or assignee of the mortgage as shown by the public record. The association shall be deemed to have complied with this requirement by making the written request of the unit owners required under this paragraph. Any notices required to be sent to the mortgagees under this paragraph shall be sent to all available addresses provided to the association.

(d) Any notice to the mortgagees required under paragraph (c) may be sent by a method that establishes proof of delivery, and any mortgagee who fails to respond within 60 days after the date of mailing shall be deemed to have consented to the amendment.

(e) For those amendments requiring mortgagee consent on or after October 1, 2006, ~~do not materially affect the rights or interests of mortgagees.~~ in the event mortgagee consent is provided other than by properly recorded joinder, such consent shall be evidenced by affidavit of the association recorded in the public records of the county where the declaration is

recorded. Any amendment adopted without the required consent of a mortgagee shall be voidable only by a mortgagee who was entitled to notice and an opportunity to consent. An action to void an amendment shall be subject to the statute of limitations beginning 5 years from the date of discovery as to the amendments described in subparagraph (a)2. and 5 years from the date of recordation of the certificate of amendment for all other amendments. This provision shall apply to all mortgages, regardless of the date of recordation of the mortgage.

Section 4. Paragraph (l) of subsection (2) of section 718.112, Florida Statutes, is amended to read:

718.112 Bylaws.--

(2) REQUIRED PROVISIONS.--The bylaws shall provide for the following and, if they do not do so, shall be deemed to include the following:

(l) Certificate of compliance.--There shall be a provision that a certificate of compliance from a licensed electrical contractor or electrician may be accepted by the association's board as evidence of compliance of the condominium units with the applicable fire and life safety code. Notwithstanding the provisions of chapter 633 or of any other code, statute, ordinance, administrative rule, or regulation, or any interpretation of the foregoing, an association, condominium, or unit owner is not obligated to retrofit the common elements or units of a residential condominium with a fire sprinkler system or other engineered lifesafety system in a building that has been certified for occupancy by the applicable governmental entity, if the unit owners have voted to forego such

retrofitting and engineered lifesafety system by the affirmative vote of two-thirds of all voting interests in the affected condominium. However, a condominium association may not vote to forego the retrofitting with a fire sprinkler system of common areas in a high-rise building. For purposes of this subsection, the term "high-rise building" means a building that is greater than 75 feet in height where the building height is measured from the lowest level of fire department access to the floor of the highest occupiable story. For purposes of this subsection, the term "common areas" means any enclosed hallway, corridor, lobby, stairwell, or entryway. In no event shall the local authority having jurisdiction require completion of retrofitting of common areas with a sprinkler system before the end of 2025 ~~2014~~.

1. A vote to forego retrofitting may be obtained by limited proxy or by a ballot personally cast at a duly called membership meeting, or by execution of a written consent by the member, and shall be effective upon the recording of a certificate attesting to such vote in the public records of the county where the condominium is located. The association shall mail, hand deliver, or electronically transmit to each unit owner written notice at least 14 days prior to such membership meeting in which the vote to forego retrofitting of the required fire sprinkler system is to take place. Within 30 days after the association's opt-out vote, notice of the results of the opt-out vote shall be mailed, hand delivered, or electronically transmitted to all unit owners. Evidence of compliance with this 30-day notice shall be made by an affidavit executed by the

person providing the notice and filed among the official records of the association. After such notice is provided to each owner, a copy of such notice shall be provided by the current owner to a new owner prior to closing and shall be provided by a unit owner to a renter prior to signing a lease.

2. As part of the information collected annually from condominiums, the division shall require condominium associations to report the membership vote and recording of a certificate under this subsection and, if retrofitting has been undertaken, the per-unit cost of such work. The division shall annually report to the Division of State Fire Marshal of the Department of Financial Services the number of condominiums that have elected to forego retrofitting.

Section 5. Section 718.114, Florida Statutes, is amended to read:

718.114 Association powers.--An association has the power to enter into agreements, to acquire leaseholds, memberships, and other possessory or use interests in lands or facilities such as country clubs, golf courses, marinas, and other recreational facilities. It has this power whether or not the lands or facilities are contiguous to the lands of the condominium, if they are intended to provide enjoyment, recreation, or other use or benefit to the unit owners. All of these leaseholds, memberships, and other possessory or use interests existing or created at the time of recording the declaration must be stated and fully described in the declaration. Subsequent to the recording of the declaration, agreements acquiring these leaseholds, memberships, or other

possessory or use interests not entered into within 12 months following the recording of the declaration shall be considered a material alteration or substantial addition to the real property that is association property, and the association may not acquire or enter into agreements acquiring these leaseholds, memberships, or other possessory or use interests except as authorized by the declaration as provided in s. 718.113. The declaration may provide that the rental, membership fees, operations, replacements, and other expenses are common expenses and may impose covenants and restrictions concerning their use and may contain other provisions not inconsistent with this chapter. A condominium association may conduct bingo games as provided in s. 849.0931.

Section 6. Subsections (1) and (2) of section 718.404, Florida Statutes, are amended to read:

718.404 Mixed-use condominiums.--When a condominium consists of both residential and commercial units, the following provisions shall apply:

(1) The condominium documents shall not provide that the owner of any commercial unit shall have the authority to veto amendments to the declaration, articles of incorporation, bylaws, or rules or regulations of the association. This subsection shall apply retroactively as a remedial measure.

(2) Subject to s. 718.301, where the number of residential units in the condominium equals or exceeds 50 percent of the total units operated by the association, owners of the residential units shall be entitled to vote for a majority of

the seats on the board of administration. This subsection shall apply retroactively as a remedial measure.

Section 7. Subsections (18) through (27) of section 719.103, Florida Statutes, are renumbered as subsections (19) through (28), respectively, and a new subsection (18) is added to that section to read:

719.103 Definitions.--As used in this chapter:

(18) "Equity facilities club" means a club comprised of recreational facilities in which proprietary membership interests are sold to individuals, which membership interests entitle the individuals to use certain physical facilities owned by the equity club. Such physical facilities do not include a residential unit or accommodation. For purposes of this definition, the term "accommodation" shall include, but is not limited to, any apartment, residential cooperative unit, residential condominium unit, cabin, lodge, hotel or motel room, or any other accommodation designed for overnight occupancy for one or more individuals.

Section 8. Section 719.507, Florida Statutes, is amended to read:

719.507 Zoning and building laws, ordinances, and regulations.--All laws, ordinances, and regulations concerning buildings or zoning shall be construed and applied with reference to the nature and use of such property, without regard to the form of ownership. No law, ordinance, or regulation shall establish any requirement concerning the use, location, placement, or construction of buildings or other improvements which are, or may thereafter be, subjected to the cooperative or

equity facilities club form of ownership, unless such requirement shall be equally applicable to all buildings and improvements of the same kind not then, or thereafter to be, subjected to the cooperative or equity facilities club form of ownership. This section does not apply if the owner in fee of any land enters into and records a covenant that existing improvements or improvements to be constructed shall not be converted to the cooperative form of residential ownership prior to 5 years after the later of the date of the covenant or completion date of the improvements. Such covenant shall be entered into with the governing body of the municipality in which the land is located or, if the land is not located in a municipality, with the governing body of the county in which the land is located.

Section 9. Subsections (4) and (5) of section 720.302, Florida Statutes, are amended to read:

720.302 Purposes, scope, and application.--

(4) This chapter does not apply to any association that is subject to regulation under chapter 718, chapter 719, or chapter 721~~,~~ or to any nonmandatory association formed under chapter 723, except to the extent that a provision of chapter 718, chapter 719, or chapter 721 is expressly incorporated into this chapter for the purpose of regulating homeowners' associations.

(5) Unless expressly stated to the contrary, corporations ~~not for profit~~ that operate residential homeowners' associations in this state shall be governed by and subject to chapter 607, if the association was incorporated under that chapter, or to chapter 617, if the association was incorporated under that

chapter, and this chapter. This subsection is intended to clarify existing law.

Section 10. Paragraph (a) of subsection (2), subsection (6), and subsection (7) of section 720.303, Florida Statutes, as amended by section 18 of chapter 2004-345 and section 135 of chapter 2005-2, Laws of Florida, are amended, and paragraph (d) is added to subsection (5) of that section, to read:

720.303 Association powers and duties; meetings of board; official records; budgets; financial reporting; association funds; recalls.--

(2) BOARD MEETINGS.--

(a) A meeting of the board of directors of an association occurs whenever a quorum of the board gathers to conduct association business. All meetings of the board must be open to all members except for meetings between the board and its attorney with respect to proposed or pending litigation where the contents of the discussion would otherwise be governed by the attorney-client privilege. The provisions of this subsection shall also apply to the meetings of any committee or other similar body when a final decision will be made regarding the expenditure of association funds and to meetings of any body vested with the power to approve or disapprove architectural decisions with respect to a specific parcel of residential property owned by a member of the community.

(5) INSPECTION AND COPYING OF RECORDS.--The official records shall be maintained within the state and must be open to inspection and available for photocopying by members or their authorized agents at reasonable times and places within 10

business days after receipt of a written request for access. This subsection may be complied with by having a copy of the official records available for inspection or copying in the community. If the association has a photocopy machine available where the records are maintained, it must provide parcel owners with copies on request during the inspection if the entire request is limited to no more than 25 pages.

(d) The association or its authorized agent is not required to provide a prospective purchaser or lienholder with information about the residential subdivision or the association other than information or documents required by this chapter to be made available or disclosed. The association or its authorized agent may charge a reasonable fee to the prospective purchaser or lienholder or the current parcel owner or member for providing good faith responses to requests for information by or on behalf of a prospective purchaser or lienholder, other than that required by law, if the fee does not exceed $150 plus the reasonable cost of photocopying and any attorney's fees incurred by the association in connection with the response.

(6) BUDGETS.--

(a) The association shall prepare an annual budget that sets out the annual operating expenses. The budget must reflect the estimated revenues and expenses for that year and the estimated surplus or deficit as of the end of the current year. The budget must set out separately all fees or charges paid for by the association for recreational amenities, whether owned by the association, the developer, or another person. The association shall provide each member with a copy of the annual

budget or a written notice that a copy of the budget is available upon request at no charge to the member. The copy must be provided to the member within the time limits set forth in subsection (5).

(b) In addition to annual operating expenses, the budget may include reserve accounts for capital expenditures and deferred maintenance for which the association is responsible to the extent that the governing documents do not limit increases in assessments, including reserves. If the budget of the association includes reserve accounts, such reserves shall be determined, maintained, and waived in the manner provided in this subsection. Once an association provides for reserve accounts in the budget, the association shall thereafter determine, maintain, and waive reserves in compliance with the provisions of this subsection.

(c) If the budget of the association does not provide for reserve accounts governed by this subsection and the association is responsible for the repair and maintenance of capital improvements that may result in a special assessment if reserves are not provided, each financial report for the preceding fiscal year required by subsection (7) shall contain the following statement in conspicuous type: THE BUDGET OF THE ASSOCIATION DOES NOT PROVIDE FOR RESERVE ACCOUNTS FOR CAPITAL EXPENDITURES AND DEFERRED MAINTENANCE THAT MAY RESULT IN SPECIAL ASSESSMENTS. OWNERS MAY ELECT TO PROVIDE FOR RESERVE ACCOUNTS PURSUANT TO THE PROVISIONS OF SECTION 720.303(6), FLORIDA STATUTES, UPON THE APPROVAL OF NOT LESS THAN A MAJORITY OF THE TOTAL VOTING INTERESTS OF THE ASSOCIATION.

(d) An association shall be deemed to have provided for reserve accounts when reserve accounts have been initially established by the developer or when the membership of the association affirmatively elects to provide for reserves. If reserve accounts are not initially provided for by the developer, the membership of the association may elect to do so upon the affirmative approval of not less than a majority of the total voting interests of the association. Such approval may be attained by vote of the members at a duly called meeting of the membership or upon a written consent executed by not less than a majority of the total voting interests in the community. The approval action of the membership shall state that reserve accounts shall be provided for in the budget and designate the components for which the reserve accounts are to be established. Upon approval by the membership, the board of directors shall provide for the required reserve accounts for inclusion in the budget in the next fiscal year following the approval and in each year thereafter. Once established as provided in this subsection, the reserve accounts shall be funded or maintained or shall have their funding waived in the manner provided in paragraph (f).

(e) The amount to be reserved in any account established shall be computed by means of a formula that is based upon estimated remaining useful life and estimated replacement cost or deferred maintenance expense of each reserve item. The association may adjust replacement reserve assessments annually to take into account any changes in estimates of cost or useful life of a reserve item.

(f) Once a reserve account or reserve accounts are established, the membership of the association, upon a majority vote at a meeting at which a quorum is present, may provide for no reserves or less reserves than required by this section. If a meeting of the unit owners has been called to determine whether to waive or reduce the funding of reserves and no such result is achieved or a quorum is not present, the reserves as included in the budget shall go into effect. After the turnover, the developer may vote its voting interest to waive or reduce the funding of reserves. Any vote taken pursuant to this subsection to waive or reduce reserves shall be applicable only to one budget year.

(g) Funding formulas for reserves authorized by this section shall be based on either a separate analysis of each of the required assets or a pooled analysis of two or more of the required assets.

1. If the association maintains separate reserve accounts for each of the required assets, the amount of the contribution to each reserve account shall be the sum of the following two calculations:

a. The total amount necessary, if any, to bring a negative component balance to zero.

b. The total estimated deferred maintenance expense or estimated replacement cost of the reserve component less the estimated balance of the reserve component as of the beginning of the period for which the budget will be in effect. The remainder, if greater than zero, shall be divided by the estimated remaining useful life of the component.

The formula may be adjusted each year for changes in estimates and deferred maintenance performed during the year and may include factors such as inflation and earnings on invested funds.

2. If the association maintains a pooled account of two or more of the required reserve assets, the amount of the contribution to the pooled reserve account as disclosed on the proposed budget shall not be less than that required to ensure that the balance on hand at the beginning of the period for which the budget will go into effect plus the projected annual cash inflows over the remaining estimated useful life of all of the assets that make up the reserve pool are equal to or greater than the projected annual cash outflows over the remaining estimated useful lives of all of the assets that make up the reserve pool, based on the current reserve analysis. The projected annual cash inflows may include estimated earnings from investment of principal. The reserve funding formula shall not include any type of balloon payments.

(h) Reserve funds and any interest accruing thereon shall remain in the reserve account or accounts and shall be used only for authorized reserve expenditures unless their use for other purposes is approved in advance by a majority vote at a meeting at which a quorum is present. Prior to turnover of control of an association by a developer to parcel owners, the developer-controlled association shall not vote to use reserves for purposes other than those for which they were intended without the approval of a majority of all nondeveloper voting interests

voting in person or by limited proxy at a duly called meeting of the association.

(7) FINANCIAL REPORTING.--Within 90 days after the end of the fiscal year, or annually on the date provided in the bylaws, the association shall prepare and complete, or contract with a third party for the preparation and completion of, a financial report for the preceding fiscal year. Within 21 days after the final financial report is completed by the association or received from the third party, but not later than 120 days after the end of the fiscal year or other date as provided in the bylaws, the association shall ~~prepare an annual financial report within 60 days after the close of the fiscal year. The association shall~~, within the time limits set forth in subsection (5), provide each member with a copy of the annual financial report or a written notice that a copy of the financial report is available upon request at no charge to the member. Financial reports shall be prepared as follows:

(a) An association that meets the criteria of this paragraph shall prepare or cause to be prepared a complete set of financial statements in accordance with generally accepted accounting principles as adopted by the Board of Accountancy. The financial statements shall be based upon the association's total annual revenues, as follows:

1. An association with total annual revenues of $100,000 or more, but less than $200,000, shall prepare compiled financial statements.

2. An association with total annual revenues of at least $200,000, but less than $400,000, shall prepare reviewed financial statements.

3. An association with total annual revenues of $400,000 or more shall prepare audited financial statements.

(b)1. An association with total annual revenues of less than $100,000 shall prepare a report of cash receipts and expenditures.

2. An association in a community of fewer than 50 parcels, regardless of the association's annual revenues, may prepare a report of cash receipts and expenditures in lieu of financial statements required by paragraph (a) unless the governing documents provide otherwise.

3. A report of cash receipts and disbursement must disclose the amount of receipts by accounts and receipt classifications and the amount of expenses by accounts and expense classifications, including, but not limited to, the following, as applicable: costs for security, professional, and management fees and expenses; taxes; costs for recreation facilities; expenses for refuse collection and utility services; expenses for lawn care; costs for building maintenance and repair; insurance costs; administration and salary expenses; and reserves if maintained by the association.

(c) If 20 percent of the parcel owners petition the board for a level of financial reporting higher than that required by this section, the association shall duly notice and hold a meeting of members within 30 days of receipt of the petition for the purpose of voting on raising the level of reporting for that

fiscal year. Upon approval of a majority of the total voting interests of the parcel owners, the association shall prepare or cause to be prepared, shall amend the budget or adopt a special assessment to pay for the financial report regardless of any provision to the contrary in the governing documents, and shall provide within 90 days of the meeting or the end of the fiscal year, whichever occurs later:

1. Compiled, reviewed, or audited financial statements, if the association is otherwise required to prepare a report of cash receipts and expenditures;

2. Reviewed or audited financial statements, if the association is otherwise required to prepare compiled financial statements; or

3. Audited financial statements if the association is otherwise required to prepare reviewed financial statements.

(d) If approved by a majority of the voting interests present at a properly called meeting of the association, an association may prepare or cause to be prepared:

1. A report of cash receipts and expenditures in lieu of a compiled, reviewed, or audited financial statement;

2. A report of cash receipts and expenditures or a compiled financial statement in lieu of a reviewed or audited financial statement; or

3. A report of cash receipts and expenditures, a compiled financial statement, or a reviewed financial statement in lieu of an audited financial statement.

Section 11. Subsection (2) of section 720.303, Florida Statutes, as amended by section 2 of chapter 2004-345 and section 15 of chapter 2004-353, Laws of Florida, is repealed.

Section 12. Section 720.3035, Florida Statutes, is created to read:

720.3035 Architectural control covenants; parcel owner improvements; rights and privileges.--

(1) The authority of an association or any architectural, construction improvement, or other such similar committee of an association to review and approve plans and specifications for the location, size, type, or appearance of any structure or other improvement on a parcel, or to enforce standards for the external appearance of any structure or improvement located on a parcel, shall only be permitted to the extent that the authority is specifically stated or reasonably inferred as to such location, size, type, or appearance in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants.

(2) If the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants provides options for the use of material, the size of the structure or improvement, the design of the structure or improvement, or the location of the structure or improvement on the parcel, neither the association nor any architectural, construction improvement, or other such similar committee of the association shall restrict the right of a parcel owner to select from the options provided in the declaration of covenants or

other published guidelines and standards authorized by the declaration of covenants.

(3) Unless otherwise specifically stated in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants, each parcel shall be deemed to have only one front for purposes of determining the required front setback even if the parcel is bounded by a roadway or other easement on more than one side. When the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants do not provide for specific setback limitations, the applicable county or municipal setback limitations shall apply, and neither the association nor any architectural, construction improvement, or other such similar committee of the association shall enforce or attempt to enforce any setback limitation that is inconsistent with the applicable county or municipal standard or standards.

(4) Each parcel owner shall be entitled to the rights and privileges set forth in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants concerning the use of the parcel, and the construction of permitted structures and improvements on the parcel and such rights and privileges shall not be unreasonably infringed upon or impaired by the association or any architectural, construction improvement, or other such similar committee of the association. If the association or any architectural, construction improvement, or other such similar committee of the association should knowingly and willfully infringe upon or impair the rights and privileges set forth in

the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants, the adversely affected parcel owner shall be entitled to recover damages caused by such infringement or impairment, including any costs and reasonable attorney's fees incurred in preserving or restoring the rights and privileges of the parcel owner set forth in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants.

(5) Neither the association nor any architectural, construction improvement, or other such similar committee of the association shall enforce any policy or restriction that is inconsistent with the rights and privileges of a parcel owner set forth in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants, whether uniformly applied or not. Neither the association nor any architectural, construction improvement, or other such similar committee of the association may rely upon a policy or restriction that is inconsistent with the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants, whether uniformly applied or not, in defense of any action taken in the name of or on behalf of the association against a parcel owner.

Section 13. Subsection (1) of section 720.305, Florida Statutes, is amended to read:

720.305 Obligations of members; remedies at law or in equity; levy of fines and suspension of use rights; failure to fill sufficient number of vacancies on board of directors to

constitute a quorum; appointment of receiver upon petition of any member.--

(1) Each member and the member's tenants, guests, and invitees, and each association, are governed by, and must comply with, this chapter, the governing documents of the community, and the rules of the association. Actions at law or in equity, or both, to redress alleged failure or refusal to comply with these provisions may be brought by the association or by any member against:

(a) The association;

(b) A member;

(c) Any director or officer of an association who willfully and knowingly fails to comply with these provisions; and

(d) Any tenants, guests, or invitees occupying a parcel or using the common areas.

The prevailing party in any such litigation is entitled to recover reasonable attorney's fees and costs. A member prevailing in an action between the association and the member under this section, in addition to recovering his or her reasonable attorney's fees, may recover additional amounts as determined by the court to be necessary to reimburse the member for his or her share of assessments levied by the association to fund its expenses of the litigation. This relief does not exclude other remedies provided by law. This section does not deprive any person of any other available right or remedy.

Section 14. Paragraph (c) of subsection (1) of section 720.306, Florida Statutes, is amended to read:

720.306 Meetings of members; voting and election procedures; amendments.--

(1) QUORUM; AMENDMENTS.--

(c) Unless otherwise provided in the governing documents as originally recorded or permitted by this chapter or chapter 617, an amendment may not materially and adversely alter the proportionate voting interest appurtenant to a parcel or increase the proportion or percentage by which a parcel shares in the common expenses of the association unless the record parcel owner and all record owners of liens on the parcels join in the execution of the amendment. For purposes of this section, a change in quorum requirements is not an alteration of voting interests. The merger or consolidation of one or more associations under a plan of merger or consolidation under chapter 607 or chapter 617 shall not be considered a material or adverse alteration of the proportionate voting interest appurtenant to a parcel.

Section 15. Paragraph (t) is added to subsection (3) of section 720.307, Florida Statutes, to read:

720.307 Transition of association control in a community.--With respect to homeowners' associations:

(3) At the time the members are entitled to elect at least a majority of the board of directors of the homeowners' association, the developer shall, at the developer's expense, within no more than 90 days deliver the following documents to the board:

(t) The financial records, including financial statements of the association, and source documents from the incorporation of the association through the date of turnover. The records shall be audited by an independent certified public accountant for the period from the incorporation of the association or from the period covered by the last audit, if an audit has been performed for each fiscal year since incorporation. All financial statements shall be prepared in accordance with generally accepted accounting principles and shall be audited in accordance with generally accepted auditing standards, as prescribed by the Board of Accountancy, pursuant to chapter 473. The certified public accountant performing the audit shall examine to the extent necessary supporting documents and records, including the cash disbursements and related paid invoices to determine if expenditures were for association purposes and the billings, cash receipts, and related records of the association to determine that the developer was charged and paid the proper amounts of assessments. This paragraph applies to associations with a date of incorporation after December 31, 2006.

Section 16. Section 720.308, Florida Statutes, is amended to read:

720.308 Assessments and charges.--

(1) ASSESSMENTS.--For any community created after October 1, 1995, the governing documents must describe the manner in which expenses are shared and specify the member's proportional share thereof. Assessments levied pursuant to the annual budget or special assessment must be in the member's proportional share

of expenses as described in the governing document, which share may be different among classes of parcels based upon the state of development thereof, levels of services received by the applicable members, or other relevant factors. While the developer is in control of the homeowners' association, it may be excused from payment of its share of the operating expenses and assessments related to its parcels for any period of time for which the developer has, in the declaration, obligated itself to pay any operating expenses incurred that exceed the assessments receivable from other members and other income of the association. This section does not apply to an association, no matter when created, if the association is created in a community that is included in an effective development-of-regional-impact development order as of the effective date of this act, together with any approved modifications thereto.

(2) GUARANTEES OF COMMON EXPENSES.--

(a) Establishment of a guarantee.--If a guarantee of the assessments of parcel owners is not included in the purchase contracts or declaration, any agreement establishing a guarantee shall only be effective upon the approval of a majority of the voting interests of the members other than the developer. Approval shall be expressed at a meeting of the members voting in person or by limited proxy or by agreement in writing without a meeting if provided in the bylaws. Such guarantee shall meet the requirements of this section.

(b) Guarantee period.--The period of time for the guarantee shall be indicated by a specific beginning and ending date or event.

1. The ending date or event shall be the same for all of the members of an association, including members in different phases of the development.

2. The guarantee may provide for different intervals of time during a guarantee period with different dollar amounts for each such interval.

3. The guarantee may provide that after the initial stated period, the developer has an option to extend the guarantee for one or more additional stated periods. The extension of a guarantee is limited to extending the ending date or event; therefore, the developer does not have the option of changing the level of assessments guaranteed.

(3) MAXIMUM LEVEL OF ASSESSMENTS.--The stated dollar amount of the guarantee shall be an exact dollar amount for each parcel identified in the declaration. Regardless of the stated dollar amount of the guarantee, assessments charged to a member shall not exceed the maximum obligation of the member based on the total amount of the adopted budget and the member's proportionate ownership share of the common elements.

(4) CASH FUNDING REQUIREMENTS DURING GUARANTEE.--The cash payments required from the guarantor during the guarantee period shall be determined as follows:

(a) If at any time during the guarantee period the funds collected from member assessments at the guaranteed level and other revenues collected by the association are not sufficient to provide payment, on a timely basis, of all assessments, including the full funding of the reserves unless properly

waived, the guarantor shall advance sufficient cash to the association at the time such payments are due.

(b) Expenses incurred in the production of nonassessment revenues, not in excess of the nonassessment revenues, shall not be included in the assessments. If the expenses attributable to nonassessment revenues exceed nonassessment revenues, only the excess expenses must be funded by the guarantor. Interest earned on the investment of association funds may be used to pay the income tax expense incurred as a result of the investment; such expense shall not be charged to the guarantor; and the net investment income shall be retained by the association. Each such nonassessment-revenue-generating activity shall be considered separately. Any portion of the parcel assessment that is budgeted for designated capital contributions of the association shall not be used to pay operating expenses.

(5) CALCULATION OF GUARANTOR'S FINAL OBLIGATION.--The guarantor's total financial obligation to the association at the end of the guarantee period shall be determined on the accrual basis using the following formula: the guarantor shall pay any deficits that exceed the guaranteed amount, less the total regular periodic assessments earned by the association from the members other than the guarantor during the guarantee period regardless of whether the actual level charged was less than the maximum guaranteed amount.

(6) EXPENSES.--Expenses incurred in the production of nonassessment revenues, not in excess of the nonassessment revenues, shall not be included in the operating expenses. If the expenses attributable to nonassessment revenues exceed

nonassessment revenues, only the excess expenses must be funded by the guarantor. Interest earned on the investment of association funds may be used to pay the income tax expense incurred as a result of the investment; such expense shall not be charged to the guarantor; and the net investment income shall be retained by the association. Each such nonassessment-revenue-generating activity shall be considered separately. Any portion of the parcel assessment that is budgeted for designated capital contributions of the association shall not be used to pay operating expenses.

Section 17. Section 720.311, Florida Statutes, is amended to read:

720.311 Dispute resolution.--

(1) The Legislature finds that alternative dispute resolution has made progress in reducing court dockets and trials and in offering a more efficient, cost-effective option to litigation. The filing of any petition for ~~mediation or~~ arbitration or the serving of an offer for presuit mediation as provided for in this section shall toll the applicable statute of limitations. Any recall dispute filed with the department pursuant to s. 720.303(10) shall be conducted by the department in accordance with the provisions of ss. 718.112(2)(j) and 718.1255 and the rules adopted by the division. In addition, the department shall conduct mandatory binding arbitration of election disputes between a member and an association pursuant to s. 718.1255 and rules adopted by the division. Neither election disputes nor recall disputes are eligible for presuit mediation; these disputes shall be arbitrated by the department.

At the conclusion of the proceeding, the department shall charge the parties a fee in an amount adequate to cover all costs and expenses incurred by the department in conducting the proceeding. Initially, the petitioner shall remit a filing fee of at least $200 to the department. The fees paid to the department shall become a recoverable cost in the arbitration proceeding, and the prevailing party in an arbitration proceeding shall recover its reasonable costs and attorney's fees in an amount found reasonable by the arbitrator. The department shall adopt rules to effectuate the purposes of this section.

(2)(a) Disputes between an association and a parcel owner regarding use of or changes to the parcel or the common areas and other covenant enforcement disputes, disputes regarding amendments to the association documents, disputes regarding meetings of the board and committees appointed by the board, membership meetings not including election meetings, and access to the official records of the association shall be the subject of an offer ~~filed with the department~~ for presuit ~~mandatory~~ mediation served by an aggrieved party before the dispute is filed in court. Presuit mediation proceedings must be conducted in accordance with the applicable Florida Rules of Civil Procedure, and these proceedings are privileged and confidential to the same extent as court-ordered mediation. Disputes subject to presuit mediation under this section shall not include the collection of any assessment, fine, or other financial obligation, including attorney's fees and costs, claimed to be due or any action to enforce a prior mediation settlement

agreement between the parties. Also, in any dispute subject to presuit mediation under this section where emergency relief is required, a motion for temporary injunctive relief may be filed with the court without first complying with the presuit mediation requirements of this section. After any issues regarding emergency or temporary relief are resolved, the court may either refer the parties to a mediation program administered by the courts or require mediation under this section. An arbitrator or judge may not consider any information or evidence arising from the presuit mediation proceeding except in a proceeding to impose sanctions for failure to attend a presuit mediation session or with the parties' agreement in a proceeding seeking to enforce the agreement. Persons who are not parties to the dispute may not attend the presuit mediation conference without the consent of all parties, except for counsel for the parties and a corporate representative designated by the association. When mediation is attended by a quorum of the board, such mediation is not a board meeting for purposes of notice and participation set forth in s. 720.303. An aggrieved party shall serve on the responding party a written offer to participate in presuit mediation in substantially the following form:

STATUTORY OFFER TO PARTICIPATE IN PRESUIT MEDIATION

The alleged aggrieved party, _____, hereby offers to _____, as the responding party, to enter into presuit mediation in connection with the

following dispute, which by statute is of a type that is subject to presuit mediation:

(List specific nature of the dispute or disputes to be mediated and the authority supporting a finding of a violation as to each dispute.)

Pursuant to section 720.311, Florida Statutes, this offer to resolve the dispute through presuit mediation is required before a lawsuit can be filed concerning the dispute. Pursuant to the statute, the aggrieved party is hereby offering to engage in presuit mediation with a neutral third-party mediator in order to attempt to resolve this dispute without court action, and the aggrieved party demands that you likewise agree to this process. If you fail to agree to presuit mediation, or if you agree and later fail to follow through with your agreement to mediate, suit may be brought against you without further warning.

The process of mediation involves a supervised negotiation process in which a trained, neutral third-party mediator meets with both parties and assists them in exploring possible opportunities for resolving part or all of the dispute. The mediation process is a voluntary one. By agreeing to participate in presuit mediation, you are not bound in any way to change your position or to enter into any type of agreement.

Furthermore, the mediator has no authority to make any decisions in this matter or to determine who is right or wrong and merely acts as a facilitator to ensure that each party understands the position of the other party and that all reasonable settlement options are fully explored. All mediation communications are confidential under the Mediation Confidentiality and Privilege Act pursuant to sections 44.401-44.406, Florida Statutes, and a mediation participant may not disclose a mediation communication to a person other than a mediation participant or a participant's counsel.

If an agreement is reached, it shall be reduced to writing and becomes a binding and enforceable commitment of the parties. A resolution of one or more disputes in this fashion avoids the need to litigate these issues in court. The failure to reach an agreement, or the failure of a party to participate in the process, results in the mediator's declaring an impasse in the mediation, after which the aggrieved party may proceed to court on all outstanding, unsettled disputes.

The aggrieved party has selected and hereby lists three certified mediators who we believe to be neutral and qualified to mediate the dispute. You have the right to select any one of these mediators. The fact

that one party may be familiar with one or more of the listed mediators does not mean that the mediator cannot act as a neutral and impartial facilitator. Any mediator who cannot act in this capacity ethically must decline to accept engagement. The mediators that we suggest, and their current hourly rates, are as follows:

(List the names, addresses, telephone numbers, and hourly rates of the mediators. Other pertinent information about the background of the mediators may be included as an attachment.)

You may contact the offices of these mediators to confirm that the listed mediators will be neutral and will not show any favoritism toward either party. The names of certified mediators may be found through the office of the clerk of the circuit court for this circuit.

If you agree to participate in the presuit mediation process, the statute requires that each party is to pay one-half of the costs and fees involved in the presuit mediation process unless otherwise agreed by all parties. An average mediation may require 3 to 4 hours of the mediator's time, including some preparation time, and each party would need to pay one-half of the mediator's fees as well as his or her

own attorney's fees if he or she chooses to employ an attorney in connection with the mediation. However, use of an attorney is not required and is at the option of each party. The mediator may require the advance payment of some or all of the anticipated fees. The aggrieved party hereby agrees to pay or prepay one-half of the mediator's estimated fees and to forward this amount or such other reasonable advance deposits as the mediator may require for this purpose. Any funds deposited will be returned to you if these are in excess of your share of the fees incurred.

If you agree to participate in presuit mediation in order to attempt to resolve the dispute and thereby avoid further legal action, please sign below and clearly indicate which mediator is acceptable to you. We will then ask the mediator to schedule a mutually convenient time and place for the mediation conference to be held. The mediation conference must be held within 90 days after the date of this letter unless extended by mutual written agreement. In the event that you fail to respond within 20 days after the date of this letter, or if you fail to agree to at least one of the mediators that we have suggested and to pay or prepay to the mediator one-half of the costs involved, the aggrieved party will be authorized to proceed with the filing of a lawsuit against you

without further notice and may seek an award of attorney's fees or costs incurred in attempting to obtain mediation.

Should you wish, you may also elect to waive presuit mediation so that this matter may proceed directly to court.

Therefore, please give this matter your immediate attention. By law, your response must be mailed by certified mail, return receipt requested, with an additional copy being sent by regular first-class mail to the address shown on this offer.

_____

_____

RESPONDING PARTY: CHOOSE ONLY ONE OF THE TWO OPTIONS BELOW. YOUR SIGNATURE INDICATES YOUR AGREEMENT TO THAT CHOICE.

AGREEMENT TO MEDIATE

The undersigned hereby agrees to participate in presuit mediation and agrees to the following mediator or mediators as acceptable to mediate this dispute:

(List acceptable mediator or mediators.)

I/we further agree to pay or prepay one-half of the mediator's fees and to forward such advance deposits as the mediator may require for this purpose.

_____

Signature of responding party #1

_____

Signature of responding party #2 (if applicable)(if property is owned by more than one person, all owners must sign)

WAIVER OF MEDIATION

The undersigned hereby waives the right to participate in presuit mediation of the dispute listed above and agrees to allow the aggrieved party to proceed in court on such matters.

_____

Signature of responding party #1

_____

Signature of responding party #2 (if applicable)(if property is owned by more than one person, all owners must sign)

(b) Service of the statutory offer to participate in presuit mediation shall be effected by sending a letter in substantial conformity with the above form by certified mail, return receipt requested, with an additional copy being sent by regular first-class mail, to the address of the responding party as it last appears on the books and records of the association. The responding party shall have 20 days from the date of the mailing of the statutory offer to serve a response to the aggrieved party in writing. The response shall be served by certified mail, return receipt requested, with an additional copy being sent by regular first-class mail, to the address shown on the statutory offer. In the alternative, the responding party may waive mediation in writing. Notwithstanding the foregoing, once the parties have agreed on a mediator, the mediator may reschedule the mediation for a date and time mutually convenient to the parties. ~~The department shall conduct the proceedings through the use of department mediators or refer the disputes to private mediators who have been duly certified by the department as provided in paragraph (c).~~ The parties shall share the costs of presuit mediation equally, including the fee charged by the mediator, if any, unless the parties agree otherwise, and the mediator may require advance payment of its reasonable fees and costs. The failure of any party to respond to a demand or response, to agree upon a mediator, to make payment of fees and costs within the time established by the mediator, or to appear for a scheduled mediation session shall operate as an impasse in the presuit mediation by such party, entitling the other party to proceed in court and to seek

an award of the costs and fees associated with the mediation. Additionally, if any presuit mediation session cannot be scheduled and conducted within 90 days after the offer to participate in mediation was filed, an impasse shall be deemed to have occurred unless both parties agree to extend this deadline. ~~If a department mediator is used, the department may charge such fee as is necessary to pay expenses of the mediation, including, but not limited to, the salary and benefits of the mediator and any travel expenses incurred. The petitioner shall initially file with the department upon filing the disputes, a filing fee of $200, which shall be used to defray the costs of the mediation. At the conclusion of the mediation, the department shall charge to the parties, to be shared equally unless otherwise agreed by the parties, such further fees as are necessary to fully reimburse the department for all expenses incurred in the mediation.~~

(c) ~~(b)~~ If presuit mediation as described in paragraph (a) is not successful in resolving all issues between the parties, the parties may file the unresolved dispute in a court of competent jurisdiction or elect to enter into binding or nonbinding arbitration pursuant to the procedures set forth in s. 718.1255 and rules adopted by the division, with the arbitration proceeding to be conducted by a department arbitrator or by a private arbitrator certified by the department. If all parties do not agree to arbitration proceedings following an unsuccessful presuit mediation, any party may file the dispute in court. A final order resulting from nonbinding arbitration is final and enforceable in the

courts if a complaint for trial de novo is not filed in a court of competent jurisdiction within 30 days after entry of the order. As to any issue or dispute that is not resolved at presuit mediation, and as to any issue that is settled at presuit mediation but is thereafter subject to an action seeking enforcement of the mediation settlement, the prevailing party in any subsequent arbitration or litigation proceeding shall be entitled to seek recovery of all costs and attorney's fees incurred in the presuit mediation process.

(d) ~~(c) The department shall develop a certification and training program for private mediators and private arbitrators which shall emphasize experience and expertise in the area of the operation of community associations.~~ A mediator or arbitrator shall be certified to conduct mediation or arbitration under this section ~~by the department~~ only if he or she has been certified as a circuit court civil mediator or arbitrator, respectively, pursuant to the requirements established ~~attended at least 20 hours of training in mediation or arbitration, as appropriate, and only if the applicant has mediated or arbitrated at least 10 disputes involving community associations within 5 years prior to the date of the application, or has mediated or arbitrated 10 disputes in any area within 5 years prior to the date of application and has completed 20 hours of training in community association disputes. In order to be certified by the department, any mediator must also be certified~~ by the Florida Supreme Court. ~~The department may conduct the training and certification program within the department or may contract with an outside~~

~~vendor to perform the training or certification. The expenses of operating the training and certification and training program shall be paid by the moneys and filing fees generated by the arbitration of recall and election disputes and by the mediation of those disputes referred to in this subsection and by the training fees.~~

(e) ~~(d)~~ The presuit mediation procedures provided by this subsection may be used by a Florida corporation responsible for the operation of a community in which the voting members are parcel owners or their representatives, in which membership in the corporation is not a mandatory condition of parcel ownership, or which is not authorized to impose an assessment that may become a lien on the parcel.

~~(3) The department shall develop an education program to assist homeowners, associations, board members, and managers in understanding and increasing awareness of the operation of homeowners' associations pursuant to this chapter and in understanding the use of alternative dispute resolution techniques in resolving disputes between parcel owners and associations or between owners. Such education program may include the development of pamphlets and other written instructional guides, the holding of classes and meetings by department employees or outside vendors, as the department determines, and the creation and maintenance of a website containing instructional materials. The expenses of operating the education program shall be initially paid by the moneys and filing fees generated by the arbitration of recall and election~~

~~disputes and by the mediation of those disputes referred to in this subsection.~~

Section 18. Except as otherwise expressly provided in this act, this act shall take effect July 1, 2006.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 849 CS Regulation of Court Interpreters
SPONSOR(S): Flores
TIED BILLS: **IDEN./SIM. BILLS:** SB 1128

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Judiciary Committee	12 Y, 0 N, w/CS	Hogge	Hogge
2) Business Regulation Committee	19 Y, 0 N	Watson	Liepshutz
3) Judiciary Appropriations Committee	5 Y, 0 N, w/CS	Brazzell	DeBeaugrine
4) Justice Council			
5)			

SUMMARY ANALYSIS

HB 849 requires the Supreme Court to establish minimum standards and procedures for foreign language court interpreters. These would cover qualifications, certification, professional conduct, discipline, and training. It would also require the Supreme Court to charge fees to applicants seeking to become certified or renew their certification as a court interpreter. These revenues would be used to fully offset the costs of administering the certification program and performing other related responsibilities. The Supreme Court would be authorized to appoint or employ personnel to assist the court in administering these responsibilities.

This bill does not appear to have a fiscal impact on state or local governments. See "Fiscal Analysis & Economic Impact Statement", below.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government. The bill authorizes the creation of a new program for certifying, training, and disciplining foreign language court interpreters. It specifically authorizes the Supreme Court to employ necessary staff to administer the program.

Ensure lower taxes. The bill requires the Supreme Court to impose fees to fund the foreign language court interpreter certification program and other responsibilities authorized in the bill.

B. EFFECT OF PROPOSED CHANGES:

Background

Courts have determined that indigent defendants have a constitutional right to a foreign language court interpreter when a fundamental interest is at stake. Implicated are the due process, equal protection, and confrontation clauses of both the federal and Florida constitutions. Additionally, in Florida, the access to courts provision is also implicated.[1] Judges have broad discretion to determine whether or not an interpreter is necessary in a particular case. By statute, the Legislature requires a judge to appoint an interpreter when the judge determines that a witness cannot hear or understand the English language or cannot express himself or herself in English sufficiently to be understood.[2] Generally, it is thought that the appointment of an interpreter serves to protect the rights of parties; assists in creating an English-language record; and facilitates the fair and efficient administration of justice.

Florida statutory law does not include standards for those serving as foreign language court interpreters and makes no provision for their certification and training. According to the Supreme Court Interpreter's Committee, Florida courts differ in the way in which they manage, regulate, and coordinate court interpreter services.[3] The state courts system has developed a voluntary statewide program to assist trial court administrators in assessing the qualifications of foreign language court interpreters, including the use of qualifications examinations and an orientation program with an overview of the Code of Professional Responsibility. Additionally, as a member of the Consortium for State Court Interpreter Certification, Florida has access to standardized testing instruments, among other services and products. Interpreters passing the written and oral tests and attending the orientation program qualify for inclusion on the Registry of Tested Court Interpreters. Approximately 300 interpreters are currently included on this registry; languages spoken include Spanish, Haitian, Russian, Italian, and Portuguese. However, individuals who are not listed on the registry are still eligible to (and do) serve as court interpreters.

A survey of the ten states with the highest number of persons who do not speak English well, as determined by the U.S. Census, show that five states statutorily delegated the authority to regulate foreign language interpreters to the court, three states do not certify interpreters, one state statutorily delegated the authority to the Executive and one state's Judiciary regulates interpreters under its inherent authority.[4]

The Supreme Court Interpreter's Committee report concluded that interpreters working in the judicial system must meet a higher standard than mere bilingualism. It concluded that court interpreters have

[1] Fla. Const. art. I, s. 21.
[2] Fla. Stat. 90.606(1)(a) (2005)
[3] Supreme Court Interpreter's Committee, Report and Recommendations 7 (October 2003).
[4] Id. at 32. This list excludes Florida which the census ranks fourth in terms of non-English speaking persons.

specialized knowledge of legal terminology, slang and technical jargon of police officers and expert witnesses.[5]

Proposed changes

The bill requires the Supreme Court to establish minimum standards and procedures for foreign language court interpreters. These would cover qualifications, certification, professional conduct, discipline, and training. The bill also requires the Supreme Court to charge fees to applicants seeking to become certified or renew their certification as a court interpreter. These revenues would be used to fully offset the costs of administering the certification program and performing other related responsibilities. The Supreme Court would be authorized to appoint or employ personnel to assist the court in administering these responsibilities.

C. SECTION DIRECTORY:

Section 1 creates an unnumbered section of law regarding Supreme Court oversight of foreign language court interpreters.

Section 2 provides an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   Indeterminate because a specific fee amount has not yet been established by the Supreme Court. However, assuming a $150 certification fee, a baseline number of certified interpreters of 300 with 25 additional persons becoming certified each year, and biennial certification, the revenues from certification fees would be $48,750 in FY 06-07, $3,750 in FY 07-08, and $56,250 in FY 08-09. These estimates do not include revenues from orientation registration or testing fees; such fees are currently being charged and collected from individuals seeking to be tested and placed on the registry. See "Fiscal Comments", below.

2. Expenditures:

   The Supreme Court presently has 1 FTE funded by general revenue permanently assigned to administer the court interpreters program. Depending on the requirements for certification imposed by the court, additional FTE's may be needed to administer the program. See "Fiscal Comments", below.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

[5] Id. at 9.

Foreign language court interpreters may be subject to payment of fees for certification.

D. FISCAL COMMENTS:

The bill requires that revenues generated by the certification program fully offset its costs. The amount of revenues generated depends upon the level of fees that are charged, while the amount of expenditures depends upon the design of the program and the number of individuals seeking certification. The extent to which the bill will stimulate additional individuals to seek certification as foreign language court interpreters is unknown.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

It is unclear whether the bill requires individuals providing court interpreting services to be certified by the Supreme Court. According to staff from the state courts system, interpretation services for some "exotic" languages is in such low demand due to the small number of individuals involved in the court system speaking those languages that providing a certification process for their interpreters would not be feasible, nor would interpreters be likely to want to obtain certification.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On March 15, 2006, the Judiciary Committee adopted two amendments and reported the bill favorably with a committee substitute. The committee substitute differs from the original bill in that the committee substitute 1) clarifies that "court interpreter" is a foreign language court interpreter and 2) removes the provision restricting Supreme Court fee authority to the amount necessary to "partially fund" this program.

On April 11, 2006, the Judiciary Appropriations Committee adopted a strike-all amendment and reported the bill favorably with a committee substitute. The amendment requires the Supreme Court to charge fees for certification of foreign language court interpreters which fully offset the cost of administering the certification program. The amendment also provides for the deposit of fee revenue into the Operating Trust Fund within the state courts system.

CHAMBER ACTION

The Judiciary Appropriations Committee recommends the following:

Council/Committee Substitute

Remove the entire bill and insert:

A bill to be entitled

An act relating to regulation of foreign language court interpreters; requiring the Supreme Court to establish standards and procedures for qualifications, certification, conduct, discipline, and training of appointed foreign language court interpreters; requiring the Supreme Court to set fees for certification applications; specifying the use and deposit of such fees; authorizing the Supreme Court to appoint or employ personnel for certain administration assistance purposes; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. The Supreme Court shall establish minimum standards and procedures for qualifications, certification, professional conduct, discipline, and training of foreign language court interpreters who are appointed by a court of competent jurisdiction. The Supreme Court shall set fees to be

charged to applicants for certification and renewal of certification as a foreign language court interpreter. The revenues generated from such fees shall be used to fully offset the costs of administration of the certification program and shall be deposited into the Operating Trust Fund within the state courts system. The Supreme Court may appoint or employ such personnel as is necessary to assist the court in administering this section.

Section 2. This act shall take effect July 1, 2006.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1139 CS Construction Defects
SPONSOR(S): Murzin
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 2036

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee	5 Y, 0 N, w/CS	Poblete	Bond
2) Business Regulation Committee	16 Y, 0 N	Livingston	Liepshutz
3) Justice Council			
4)			
5)			

SUMMARY ANALYSIS

Current law provides an alternative dispute resolution process that persons must follow regarding construction defects that is only applicable to residential property owners. Before a lawsuit can be initiated against a contractor, subcontractor, supplier, or design professional for an alleged construction defect, the claimant must serve written notice of the claim to the defendant and provide an opportunity to resolve that claim.

This bill expands the requirement to provide notice and an opportunity to cure to include commercial construction, in addition to, the current requirements for residential construction projects.

This bill does not appear to have a fiscal impact on state or local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Safeguard Individual Liberty – This bill extends the alternative dispute resolution mechanism regarding construction defects to any property owner, not just owners of residential property.

Promote Personal Responsibility – This bill provides that in construction disputes, all property owners must file a written notice of claim and provide an opportunity to resolve the claim for contractors, subcontractors, suppliers, or design professionals purported to be responsible for construction defects.

B. EFFECT OF PROPOSED CHANGES:

Background

In order to reduce the need for litigation and to protect the rights of homeowners, ch. 558, F.S., was created in 2003 to provide an alternative dispute resolution process that persons must follow regarding construction defects in residential property. Before a lawsuit can be initiated against a contractor, subcontractor, supplier, or design professional for an alleged construction defect, the claimant must serve written notice of the claim to the defendant and provide an opportunity to resolve that claim.[1] The provisions of this chapter apply to the following types of construction:[2]

- Single family homes
- Manufactured or modular homes
- Duplexes
- Triplexes
- Quadruplexes
- Condominiums
- Cooperative Units

Notice[3]

A claimant must serve a written notice of claim within 15 days after discovering the alleged defect, but the failure to do so does not bar the filing of an action. The notice must be served no later than 60 days prior to the filing of an action involving a single family home, an association representing 20 or fewer residential parcels, a manufactured or modular home, a duplex, triplex, or a quadruplex or at least 120 days prior to the filing of an action involving an association representing more than 20 residential parcel owners. The notice must describe the claim in reasonable detail sufficient to determine the nature of each alleged construction defect, and it must include a description of the damage or loss resulting from the defect.

Opportunity to Repair[4]

Within 30 days after receipt of the notice of claim or 50 days with a notice of claim involving an association representing more than 20 residential parcels, the recipient is entitled to perform a reasonable inspection of the dwelling alleged to have a construction defect. A claimant must provide access to the dwelling during normal working hours such that the nature and cause of the defect as well as the extent to which repairs are needed to remedy the defect can be determined. If destructive testing is necessary to determine the nature and cause of the alleged defect, the recipient must notify

[1] s. 558.004, F.S.
[2] s. 558.002(7), F.S.
[3] s. 558.004(1), F.S.
[4] s. 558.004(2)(a)-(f), F.S.

the claimant in writing, describing specific aspects of the test. If a claimant promptly objects to the testing, the recipient must provide the claimant a list of three qualified persons from which the claimant may select one to perform the testing. If a claimant fails or refuses to agree to destructive testing, the claimant has no claim for damages which could have been avoided or mitigated had the destructive testing been allowed when requested.

Forwarding a Copy of the Notice of Claim[5]

Within 10 days after receipt of the notice of claim or 30 days with a notice of claim involving an association representing more than 20 residential parcels, the recipient may forward a copy of the notice of claim to each contractor, subcontractor, supplier, or design professional reasonably believed to be responsible for each defect, noting the specific defect each is believed to be responsible for. Such persons will be entitled to inspect the dwelling as provided for in s. 558.004(2), F.S.

Written Response to Copy of Notice of Claim[6]

Within 15 days after receipt of the copy of the notice of claim or 30 days with a copy of the notice of claim involving an association representing more than 20 residential parcels, the recipient must serve a written response to the person who forwarded the copy of the notice of claim. The response should indicate the findings and results of the inspection, a statement as to whether the recipient is willing to make repairs to remedy the alleged defect, and a timetable concerning its completion.

Written Response to Claimant After Receipt of Initial Notice of Claim[7]

Within 45 days after receiving notice of claim or 75 days with a notice of claim involving an association representing more than 20 residential parcels, the recipient must serve a written response to the claimant providing for one of the following:

- A written offer to remedy the alleged construction defect at no cost to the claimant, a detailed description of the proposed repairs necessary to remedy the defect, and a timetable regarding completion;
- A written offer to compromise and settle the claim by monetary payment that will not obligate the person's insurer, and a timetable for making payments;
- A written offer to compromise and settle the claim by a combination of repairs and monetary payment in the manners stated above;
- A written statement that the person disputes the claim and will not remedy the defect or compromise and settle the claim; or
- A written statement that a monetary payment will be determined by the person's insurer within 30 days after simultaneous notification to the insurer and the claimant of this settlement option, which the claimant can accept or reject. If the insurer does not respond within the 30 days following notification, the claimant shall be deemed to have met all conditions precedent to commencing an action.

Claimant's Acceptance of an Offer[8]

If a claimant accepts an offer to repair the alleged construction defect, the claimant shall provide the offeror and the offeror's agents reasonable access to the dwelling during normal working hours. If the offeror does not repair or make payment within the agreed time and manner, except for reasonable delays beyond the offeror's control, the claimant may proceed with an action against the offeror. If the offeror does make payment or repairs within the agreed time and manner, the claimant is barred from proceeding with an action.

[5] s. 558.004(3), F.S.
[6] s. 558.004(4), F.S.
[7] s. 558.004(5)(a)-(e), F.S.
[8] s. 558.004(8), F.S.

Any offer or failure to offer to remedy an alleged defect or to compromise and settle the claim by monetary payment does not constitute an admission of liability and is inadmissible in an action brought under ch. 558, F.S.[9]

After receipt of the first initial notice of claim, a claimant and the recipient may alter the procedure for the notice of claim process by written mutual agreement.[10]

Effect of Bill

This bill amends ss. 558.001, 558.002, 558.004, and 558.005, F.S., to provide that the procedures set forth in ch. 558, F.S., apply to not only residential property owners but to all real property owners. All terms related to residential property are replaced with terms relating to real property.

Also, this bill adds specific references to manufactured or modular homes, which are covered under current law; and this bill creates separate notices to cover the time periods before the effective date and after. Finally, this bill excludes construction contracts for public transportation projects from being subject to the provisions of ch. 558, F.S.

C. SECTION DIRECTORY:

Section 1 amends s. 558.001, F.S., to amend legislative findings.

Section 2 amends s. 558.002, F.S., to amend the definitions relating to residential property or homeowners with those relating to real property and property owners, respectively.

Section 3 amends s. 558.004, F.S., to expand the requirements of notice and opportunity to cure to all construction.

Section 4 amends s. 558.005, F.S., by replacing the terms relating to residential property in the notice of claim required for a contract to be subject to this section with terms relating to real property. It also provides that the notice requirements put forth in this section apply to contracts entered into on or after October 1, 2006.

Section 5 provides an effective date of October 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

[9] s. 558.004(9), F.S.
[10] s. 558.005(3), F.S.

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, nor does it reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor does it reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Subsection (1) of s. 558.005, as amended by this bill, refers to time periods prior to October 1, 2006, but then uses the expanded term of "real property" rather than the term "dwelling" that is appropriate to that time period.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On March 28, 2006, the Civil Justice Committee adopted one amendment to the bill. The amendment:

- Restores application of the statute to manufactured or modular homes.
- Excludes public transportation projects.
- Clarifies the transition periods and forms applicable to the transition to a broader range of construction activities.

The bill was then reported favorably with committee substitute.

CHAMBER ACTION

The Civil Justice Committee recommends the following:

Council/Committee Substitute

Remove the entire bill and insert:

A bill to be entitled

An act relating to construction defects; amending ss. 558.001, 558.002, and 558.004, F.S.; revising provisions to expand application to construction defects in any property other than public transportation projects; deleting language limiting application to only residential property; amending s. 558.005, F.S.; revising provisions relating to required notices for construction defect claims under certain construction contracts; applying provisions of ch. 558, F.S., notwithstanding certain notice requirements; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 558.001, Florida Statutes, is amended to read:

558.001 Legislative findings and declaration.--The Legislature finds that it is beneficial to have an alternative method to resolve construction disputes that would reduce the

need for litigation as well as protect the rights of property owners ~~homeowners~~. An effective alternative dispute resolution mechanism in certain construction defect matters should involve the claimant filing a notice of claim with the contractor, subcontractor, supplier, or design professional that the claimant asserts is responsible for the defect, and should provide the contractor, subcontractor, supplier, or design professional with an opportunity to resolve the claim without resort to further legal process.

Section 2. Section 558.002, Florida Statutes, is amended to read:

558.002 Definitions.--As used in this chapter, the term:

(1) "Action" means any civil action or arbitration proceeding for damages or indemnity asserting a claim for damage to or loss of real ~~a dwelling~~ or personal property caused by an alleged construction defect, but does not include any administrative action or any civil action or arbitration proceeding asserting a claim for alleged personal injuries arising out of an alleged construction defect.

(2) "Association" has the same meaning as in s. 718.103(2), s. 719.103(2), s. 720.301(9), or s. 723.075.

(3) "Claimant" means a property owner ~~homeowner~~, including a subsequent purchaser or association, who asserts a claim for damages against a contractor, subcontractor, supplier, or design professional concerning a construction defect or a subsequent owner who asserts a claim for indemnification for such damages. The term does not include a contractor, subcontractor, supplier, or design professional.

(4) "Construction defect" means a deficiency in, or a deficiency arising out of, the design, specifications, surveying, planning, supervision, observation of construction, or construction, repair, alteration, or remodeling of ~~a dwelling, any appurtenance to the dwelling, or the~~ real property ~~to which the dwelling or appurtenance is affixed~~ resulting from:

(a) Defective material, products, or components used in the construction or remodeling;

(b) A violation of the applicable codes in effect at the time of construction or remodeling which gives rise to a cause of action pursuant to s. 553.84;

(c) A failure of the design of real property ~~a dwelling~~ to meet the applicable professional standards of care at the time of governmental approval; or

(d) A failure to construct or remodel real property ~~a dwelling~~ in accordance with accepted trade standards for good and workmanlike construction at the time of construction.

(5) "Contractor" means any person, as defined in s. 1.01, that is legally engaged in the business of designing, developing, constructing, manufacturing, repairing, or remodeling real property ~~dwellings or attachments thereto~~.

(6) "Design professional" means a person, as defined in s. 1.01, licensed in this state as an architect, interior designer, landscape architect, engineer, or surveyor.

(7) "Real property ~~Dwelling~~" means land that is improved and the improvements on such land, including fixtures, manufactured housing, or mobile homes and excluding public transportation projects ~~a single-family house, manufactured or~~

~~modular home, duplex, triplex, quadruplex, or other multifamily unit in a multifamily residential building designed for residential use in which title to each individual unit is transferred to the owner under a condominium or cooperative system and includes common areas and improvements that are owned or maintained by an association or by members of an association, and also includes the systems, other components, improvements, and other structures or facilities, including, but not limited to, recreational structures or facilities, that are appurtenant to and located on the real property on which the house, duplex, triplex, quadruplex, or other multifamily unit is located, but are not necessarily part of the structure at the time of completion of construction~~.

(8) "Service" means delivery by certified mail, return receipt requested, to the last known address of the addressee.

(9) "Subcontractor" means a person, as defined in s. 1.01, who is a contractor who performs labor and supplies material on behalf of another contractor in the construction or remodeling of real property ~~a dwelling~~.

(10) "Supplier" means a person, as defined in s. 1.01, who provides only materials, equipment, or other supplies for the construction or remodeling of real property ~~a dwelling~~.

Section 3. Subsections (1), (2), (3), (4), (5), (8), (9), and (14) of section 558.004, Florida Statutes, are amended to read:

558.004 Notice and opportunity to repair.--

(1) In actions brought alleging a construction defect, the claimant shall, at least 60 days before filing any ~~an~~ action

~~involving a single-family home, an association representing 20 or fewer residential parcels, a manufactured or modular home, a duplex, a triplex, or a quadruplex~~, or at least 120 days before filing an action involving an association representing more than 20 parcels ~~residential parcel owners~~, serve written notice of claim on the contractor, subcontractor, supplier, or design professional, as applicable, which notice shall refer to this chapter. If the construction defect claim arises from work performed under a contract, the written notice of claim must be served on the person with whom the claimant contracted. The notice of claim must describe the claim in reasonable detail sufficient to determine the general nature of each alleged construction defect and a description of the damage or loss resulting from the defect, if known. The claimant shall endeavor to serve the notice of claim within 15 days after discovery of an alleged defect, but the failure to serve notice of claim within 15 days does not bar the filing of an action, subject to s. 558.003. This subsection does not preclude a claimant from filing an action sooner than 60 days, or 120 days as applicable, after service of written notice as expressly provided in subsection (6), subsection (7), or subsection (8).

(2) Within 30 days after receipt of the notice of claim ~~involving a single-family home, an association representing 20 or fewer residential parcels, a manufactured or modular home, a duplex, a triplex, or a quadruplex~~, or within 50 days after receipt of the notice of claim involving an association representing more than 20 ~~residential~~ parcels, the person receiving the notice of claim under subsection (1) is entitled

to perform a reasonable inspection of the property ~~dwelling~~ or of each unit subject to the claim to assess each alleged construction defect. An association's right to access property for either maintenance or repair includes the authority to grant access for the inspection. The claimant shall provide the person receiving the notice under subsection (1) and such person's contractors or agents reasonable access to the property ~~dwelling~~ during normal working hours to inspect the property ~~dwelling~~ to determine the nature and cause of each alleged construction defect and the nature and extent of any repairs or replacements necessary to remedy each defect. The person receiving notice under subsection (1) shall reasonably coordinate the timing and manner of any and all inspections with the claimant to minimize the number of inspections. The inspection may include destructive testing by mutual agreement under the following reasonable terms and conditions:

(a) If the person receiving notice under subsection (1) determines that destructive testing is necessary to determine the nature and cause of the alleged defects, such person shall notify the claimant in writing.

(b) The notice shall describe the destructive testing to be performed, the person selected to do the testing, the estimated anticipated damage and repairs to the property ~~dwelling~~ resulting from the testing, the estimated amount of time necessary for the testing and to complete the repairs, and the financial responsibility offered for covering the costs of repairs.

(c) If the claimant promptly objects to the person selected to perform the destructive testing, the person receiving notice under subsection (1) shall provide the claimant with a list of three qualified persons from which the claimant may select one such person to perform the testing. The person selected to perform the testing shall operate as an agent or subcontractor of the person receiving notice under subsection (1) and shall communicate with, submit any reports to and be solely responsible to the person receiving notice.

(d) The testing shall be done at a mutually agreeable time.

(e) The claimant or a representative of the claimant may be present to observe the destructive testing.

(f) The destructive testing shall not render the property ~~dwelling~~ uninhabitable.

In the event the claimant fails or refuses to agree to destructive testing, the claimant shall have no claim for damages which could have been avoided or mitigated had destructive testing been allowed when requested and had a feasible remedy been promptly implemented.

(3) Within 10 days after receipt of the notice of claim ~~involving a single-family home, an association representing 20 or fewer residential parcels, a manufactured or modular home, a duplex, a triplex, or a quadruplex~~, or within 30 days after receipt of the notice of claim involving an association representing more than 20 ~~residential~~ parcels, the person receiving the notice under subsection (1) may forward a copy of

the notice of claim to each contractor, subcontractor, supplier, or design professional whom it reasonably believes is responsible for each defect specified in the notice of claim and shall note the specific defect for which it believes the particular contractor, subcontractor, supplier, or design professional is responsible. Each such contractor, subcontractor, supplier, and design professional may inspect the property ~~dwelling~~ as provided in subsection (2).

(4) Within 15 days after receiving a copy of the notice of claim pursuant to subsection (3) ~~involving a single-family home, an association representing 20 or fewer residential parcels, a manufactured or modular home, a duplex, a triplex, or a quadruplex~~, or within 30 days after receipt of the copy of the notice of claim involving an association representing more than 20 ~~residential~~ parcels, the contractor, subcontractor, supplier, or design professional must serve a written response to the person who forwarded a copy of the notice of claim. The written response shall include a report, if any, of the scope of any inspection of the property ~~dwelling~~, the findings and results of the inspection, a statement of whether the contractor, subcontractor, supplier, or design professional is willing to make repairs to the property ~~dwelling~~ or whether such claim is disputed, a description of any repairs they are willing to make to remedy the alleged construction defect, and a timetable for the completion of such repairs.

(5) Within 45 days after receiving the notice of claim ~~involving a single-family home, an association representing 20 or fewer residential parcels, a manufactured or modular home, a~~

~~duplex, a triplex, or a quadruplex~~, or within 75 days after receipt of a copy of the notice of claim involving an association representing more than 20 ~~residential~~ parcels, the person who received notice under subsection (1) must serve a written response to the claimant. The response shall be served to the attention of the person who signed the notice of claim, unless otherwise designated in the notice of claim. The written response must provide:

(a) A written offer to remedy the alleged construction defect at no cost to the claimant, a detailed description of the proposed repairs necessary to remedy the defect, and a timetable for the completion of such repairs;

(b) A written offer to compromise and settle the claim by monetary payment, that will not obligate the person's insurer, and a timetable for making payment;

(c) A written offer to compromise and settle the claim by a combination of repairs and monetary payment, that will not obligate the person's insurer, that includes a detailed description of the proposed repairs and a timetable for the completion of such repairs and making payment;

(d) A written statement that the person disputes the claim and will not remedy the defect or compromise and settle the claim; or

(e) A written statement that a monetary payment, including insurance proceeds, if any, will be determined by the person's insurer within 30 days after notification to the insurer by means of forwarding the claim, which notification shall occur at the same time the claimant is notified of this settlement

option, which the claimant can accept or reject. A written statement under this paragraph may also include an offer under paragraph (c), but such offer shall be contingent upon the claimant also accepting the determination of the insurer whether to make any monetary payment in addition thereto. If the insurer for the person receiving the claim makes no response within the 30 days following notification, then the claimant shall be deemed to have met all conditions precedent to commencing an action.

(8) If the claimant timely and properly accepts the offer to repair an alleged construction defect, the claimant shall provide the offeror and the offeror's agents reasonable access to the claimant's property ~~dwelling~~ during normal working hours to perform the repair by the agreed-upon timetable as stated in the offer. If the offeror does not make the payment or repair the defect within the agreed time and in the agreed manner, except for reasonable delays beyond the control of the offeror, including, but not limited to, weather conditions, delivery of materials, claimant's actions, or issuance of any required permits, the claimant may, without further notice, proceed with an action against the offeror based upon the claim in the notice of claim. If the offeror makes payment or repairs the defect within the agreed time and in the agreed manner, the claimant is barred from proceeding with an action for the claim described in the notice of claim or as otherwise provided in the accepted settlement offer.

(9) This section does not prohibit or limit the claimant from making any necessary emergency repairs to the property

~~dwelling~~ as are required to protect the health, safety, and welfare of the claimant. In addition, any offer or failure to offer pursuant to subsection (5) to remedy an alleged construction defect or to compromise and settle the claim by monetary payment does not constitute an admission of liability with respect to the defect and is not admissible in an action brought under this chapter.

(14) To the extent that an arbitration clause in a contract for the sale, design, construction, or remodeling of real property ~~a dwelling~~ conflicts with this section, this section shall control.

Section 4. Section 558.005, Florida Statutes, is amended to read:

558.005 Contract provisions; application.--

(1) Except as otherwise provided in subsections (3) and (4), the provisions of this chapter shall apply to ~~control~~ every contract for the design, construction, or remodeling of real property ~~a dwelling~~ entered into:

(a) Between ~~on or after~~ July 1, 2004, and September 30, 2006, which contains the notice as set forth in paragraph (2)(a) ~~subsection (2)~~ and is conspicuously set forth in capitalized letters.

(b) On or after October 1, 2006, which contains the notice set forth in paragraph (2)(b) and is conspicuously set forth in capitalized letters.

(2)(a) The notice required by paragraph (1)(a) ~~subsection (1)~~ must be in substantially the following form:

CHAPTER 558 NOTICE OF CLAIM

CHAPTER 558, FLORIDA STATUTES, CONTAINS IMPORTANT REQUIREMENTS YOU MUST FOLLOW BEFORE YOU MAY BRING ANY LEGAL ACTION FOR AN ALLEGED CONSTRUCTION DEFECT IN YOUR HOME. SIXTY DAYS BEFORE YOU BRING ANY LEGAL ACTION, YOU MUST DELIVER TO THE OTHER PARTY TO THIS CONTRACT A WRITTEN NOTICE, REFERRING TO CHAPTER 558, OF ANY CONSTRUCTION CONDITIONS YOU ALLEGE ARE DEFECTIVE AND PROVIDE SUCH PERSON THE OPPORTUNITY TO INSPECT THE ALLEGED CONSTRUCTION DEFECTS AND TO CONSIDER MAKING AN OFFER TO REPAIR OR PAY FOR THE ALLEGED CONSTRUCTION DEFECTS. YOU ARE NOT OBLIGATED TO ACCEPT ANY OFFER WHICH MAY BE MADE. THERE ARE STRICT DEADLINES AND PROCEDURES UNDER THIS FLORIDA LAW WHICH MUST BE MET AND FOLLOWED TO PROTECT YOUR INTERESTS.

(b) The notice required by paragraph (1)(b) must expressly cite this chapter and be in substantially the following form:

CHAPTER 558 NOTICE OF CLAIM

CHAPTER 558, FLORIDA STATUTES, CONTAINS IMPORTANT REQUIREMENTS YOU MUST FOLLOW BEFORE YOU MAY BRING ANY LEGAL ACTION FOR AN ALLEGED CONSTRUCTION DEFECT. SIXTY DAYS BEFORE YOU BRING ANY LEGAL ACTION, YOU MUST DELIVER TO THE OTHER PARTY TO THIS CONTRACT A WRITTEN NOTICE, REFERRING TO CHAPTER 558, OF ANY CONSTRUCTION CONDITIONS YOU ALLEGE ARE DEFECTIVE AND PROVIDE SUCH PERSON THE OPPORTUNITY TO INSPECT THE ALLEGED CONSTRUCTION DEFECTS AND TO CONSIDER MAKING AN OFFER TO REPAIR OR PAY FOR THE ALLEGED CONSTRUCTION DEFECTS. YOU ARE NOT OBLIGATED TO ACCEPT

ANY OFFER WHICH MAY BE MADE. THERE ARE STRICT DEADLINES AND PROCEDURES UNDER THIS FLORIDA LAW WHICH MUST BE MET AND FOLLOWED TO PROTECT YOUR INTERESTS.

(3) After receipt of the initial notice of claim, a claimant and the person receiving notice under s. 558.004(1) may, by written mutual agreement, alter the procedure for the notice of claim process described in this chapter.

(4) This chapter applies to all actions accruing on or after July 1, 2004, and all actions commenced on or after such date, regardless of the date of sale, issuance of a certificate of occupancy or its equivalent, or substantial completion of the construction ~~dwelling~~. Notwithstanding the notice requirements of this section for contracts entered into between ~~on or after~~ July 1, 2004, and September 30, 2006, this chapter applies to all actions accruing before July 1, 2004, but not yet commenced as of July 1, 2004, and failure to include such ~~the~~ notice requirements ~~of this section~~ in a contract entered into prior to July 1, 2004, does not operate to bar the procedures of this chapter from applying to all such actions. Notwithstanding the notice requirements of this section for contracts entered into on or after October 1, 2006, this chapter applies to all actions accruing before July 1, 2004, but not yet commenced as of July 1, 2004, and failure to include such notice requirements in a contract entered into before July 1, 2004, does not operate to bar the procedures of this chapter from applying to all such actions.

Section 5. This act shall take effect October 1, 2006.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1193 CS Driving Under the Influence
SPONSOR(S): Kottkamp
TIED BILLS: **IDEN./SIM. BILLS:** SB 2468

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Criminal Justice Committee	8 Y, 0 N, w/CS	Kramer	Kramer
2) Transportation Committee	13 Y, 1 N	Miller	Miller
3) Criminal Justice Appropriations Committee	5 Y, 0 N	Sneed	DeBeaugrine
4) Justice Council			
5)			

SUMMARY ANALYSIS

Currently, a person who operates a vehicle under the influence and who by reason of such operation, causes or contributes to:

- Damage to the property or the person of another commits a first degree misdemeanor.
- Serious bodily injury to another, commits a third degree felony
- The death of any human being or unborn quick child, commits DUI manslaughter, a second degree felony. The offense is a first degree felony if at the time of the crash, the person knew or should have known that the crash occurred and failed to give information and render aid as required by s. 316.062, F.S.

HB 1193 amends this provision to provide that any person who operates a vehicle under the influence creates a rebuttable presumption that he or she caused or contributed to causing damage to the person or property of another, serious bodily injury to another, or death to another human being or unborn quick child.

Vehicular homicide is the killing of a human being caused by the operation of a motor vehicle by another in a reckless manner likely to cause the death of, or great bodily harm to another. The bill provides that any person who drives under the influence creates a rebuttable presumption that he or she operated a motor vehicle in a reckless manner likely to cause death or great bodily harm to a human being.

This bill is estimated to have no fiscal impact on state or local government.
This bill takes effect July 1, 2006.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government/safeguard individual liberty: The bill amends the DUI and vehicular homicide statutes to create a rebuttable presumption that a person who operated a vehicle under the influence caused damage to property or death.

B. EFFECT OF PROPOSED CHANGES:

Driving Under the Influence: Section 316.193(1), F.S. provides that the offense of driving under the influence is committed if a person is driving or in the actual physical control of a vehicle within the state and:

- The person is under the influence of alcoholic beverages, any chemical substance or any controlled substance when affected to the extent that the person's normal faculties are impaired;
- The person has a blood-alcohol level of 0.08 or more grams of alcohol per 100 milliliters of blood; or
- The person has a breath-alcohol level of 0.08 or more grams of alcohol per 210 liters of breath.

A person who is in violation of the above provision, who operates a vehicle and *who by reason of such operation, causes or contributes to causing*:

1. Damage to the property or the person of another commits a first degree misdemeanor.
2. Serious bodily injury to another, commits a third degree felony
3. The death of any human being or unborn quick child commits DUI manslaughter, a second degree felony. The offense is a first degree felony if at the time of the crash, the person knew or should have known that the crash occurred and failed to give information and render aid as required by s. 316.062, F.S.

HB 1193 amends this provision to provide that any person who drives under the influence as described in s. 316.193(1), F.S. creates a rebuttable presumption that he or she caused or contributed to causing damage to the person or property of another, serious bodily injury to another, or death to another human being or unborn quick child.

Until 1986, the DUI manslaughter statute (previously referred to as "manslaughter by intoxication") was interpreted as not requiring proof of a "causal connection between the manner of operation of the defendant's motor vehicle and the death of the victim". *Magaw v. State*, 537 So.2d 564, 565 (Fla. 1989). The Supreme Court referred to the statute as having "strict liability consequences". *Baker v. State,* 377 So.2d 17 (Fla. 1979)(upholding constitutionality of statute). In 1986 the statute was amended to "introduce causation as an element" of the offense. *Magaw*, 537 So.2d at 567; *State v. Hubbard*, 751 So.2d 552 (Fla. 1999).

Vehicular Homicide*:* Vehicular homicide is the killing of a human being, or the killing of a "viable fetus" by any injury to the mother, caused by the operation of a motor vehicle by another *in a reckless manner likely to cause the death of, or great bodily harm to, another.*[1] The degree of culpability required to prove that a driver was reckless is less than culpable negligence, which is the standard for manslaughter, but more than a mere failure to use ordinary care.[2] The offense is a second degree

[1] § 782.071, F.S.

[2] McCreary v. State, 371 So.2d 1024 (Fla.1979); Michel v. State, 752 So.2d 6, 12 (Fla. 5th DCA 2000)(holding that evidence supported vehicular homicide conviction where defendants had been ordered off the interstate for failing to have the proper equipment

felony. If at the time of the accident, the person knew or should have known that the accident occurred and the person failed to give information or render aid, the offense is a first degree felony.

The bill provides that for purposes of this section, a person who violates s. 316.193(1), F.S., relating to driving under the influence, creates a rebuttable presumption that he or she operated a motor vehicle in a reckless manner likely to cause death or great bodily harm to a human being.

C. SECTION DIRECTORY:

Section 1. Amends s. 316.193, F.S., relating to driving under the influence; creating rebuttable presumption.

Section 2. Amends s. 782.071, F.S., relating to vehicular homicide; creating rebuttable presumption.

Section 3. Provides effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   The bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

2. Other:

Currently, in order to prove a DUI manslaughter case, in addition to proving the impairment of the driver, the state must prove that by operating the vehicle, the driver caused or contributed to causing the death of a human being. HB 1193 provides that the fact that a person drove under the influence creates a rebuttable presumption that the person caused or contributed to causing the death of another human being. The bill also creates a similar presumption in the vehicular homicide statute. An issue could be raised as to whether this provision violates the Due Process Clause by unconstitutionally shifting the burden of proof to the defendant.

A recent 5th District Court of Appeal case contained a thorough discussion on the issue of presumptions:

> 'Inferences and presumptions are a staple of our adversary system of factfinding.' The ultimate test of the constitutional validity of any such evidentiary device is that it 'must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt.' To satisfy the requirements of due process, all inferences and presumptions must pass the 'rational connection' test, which requires, at minimum, that it must "be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." In Allen, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777, the Court had occasion to consider and refine what had been its somewhat confusing past treatment of inferences and presumptions. The Allen Court examined the value of these evidentiary devices and their validity under the due process clauses contained in the Fifth and Fourteenth Amendments to the United States Constitution in light of 'the strength of the connection between the particular basic and elemental facts involved and on the degree to which the device curtails the factfinder's freedom to assess the evidence independently.' The Court used the terms 'permissive inference' and 'mandatory presumption' to describe two types of evidentiary devices that will be subjected to constitutional scrutiny.
>
> A permissive inference allows, but does not require, the trier of fact to infer the elemental fact from proof of a basic fact and does not place any burden on the defendant. In this situation, the basic fact may constitute prima facie evidence of the elemental fact. On the other hand, a mandatory presumption tells a factfinder that he or they must find the elemental fact upon proof of the basic fact, unless the defendant offers evidence that rebuts the presumption created by the connection between the two facts. Because of the differences in the two types of presumptions, the threshold inquiry in analysis of the constitutionality of a statutory presumption is to determine the type of presumption that the statute creates.
>
> If the statute creates a permissive inference, a party challenging it is generally required to demonstrate its invalidity as applied to him. Because a permissive inference allows a trier of fact to reject the inference and does not shift the burden of proof, 'it affects the application of the 'beyond a reasonable doubt' standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference.' Accordingly, a permissive inference will be valid so long as, under the facts of the case, the presumed fact 'more likely than not' flows from the basic fact and the inference is not the sole basis for a finding of guilt. On the other hand, if, under the facts of the case, it is clear that the inference is the sole basis for a finding of guilt, the fact proved must be sufficient to support the inference of guilt beyond a reasonable doubt.
>
> *If the statute creates a mandatory presumption, the Court has generally examined the presumption on its face to determine the extent to which the basic and elemental facts coincide. Because the jury must accept the mandatory presumption even if it is the sole evidence of an element of the offense and because the State bears the burden of establishing guilt, the presumed fact must flow from the basic fact beyond a reasonable doubt.*

State v. Rygwelski, 899 So.2d 498, 501 -502 (Fla.2nd DCA. 2005)(citations omitted)(holding that statute that provides that failure to redeliver property within five days after receipt of demand for

return "is prima facie evidence of fraudulent intent" creates a permissive inference, not a mandatory presumption).

In *State v. Brake*, 796 So.2d 522 (Fla. 2001), the Florida Supreme Court considered the constitutionality of a statutory presumption that a person who lured or enticed a child under the age of 12 into a dwelling without the consent of the child's parent was doing so for other than a lawful purpose. In striking the presumption, the court analyzed the provision as follows:

> In assessing the constitutionality of such presumptions, the United States Supreme Court "has generally examined the presumption on its face to determine the extent to which the basic and elemental facts coincide." As the Supreme Court [has] explained ..... "a criminal statutory presumption must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend."
>
> In the instant case, the statute permits the State to prove the mens rea element of the offense ("for other than a lawful purpose") by proving lack of parental consent for the child to enter the structure, dwelling, or conveyance with the defendant. We cannot say with substantial assurance that a defendant's unlawful intent can be so presumed. For example, a neighbor who invites a child into their house for a perfectly innocent reason is not likely to seek parental permission.

According to the language of HB 1193, any person who operates a vehicle under the influence *creates* a "rebuttable presumption " that he or she caused damage or death. This language appears to create a "mandatory presumption" – requiring the factfinder to find that the defendant caused the harm or death unless the presumption is rebutted by the defendant. As a result, it appears that the test to be applied to the presumption is whether the presumed fact (causation of harm or death) must flow from the basic fact (operating a vehicle under the influence) beyond a reasonable doubt.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

The Criminal Justice Committee adopted two amendments. As filed, the bill amended the vehicular homicide statute to provide that any person who drives under the influence creates a rebuttable presumption that he or she operated a motor vehicle in a reckless manner likely to cause death or *bodily injury* to a human being. However, this statute requires proof that a person operated a motor vehicle in a reckless manner likely to cause the death of or *great bodily harm* to another. The first amendment amended the presumption to include great bodily harm instead of bodily injury to conform the two provisions.

The committee also adopted an amendment which modified the presumption relating to DUI to include damage to the person of another to conform to the rest of the statute.

CHAMBER ACTION

The Criminal Justice Committee recommends the following:

Council/Committee Substitute

Remove the entire bill and insert:

A bill to be entitled

An act relating to driving under the influence; amending s. 316.193, F.S.; providing that, if a person drives under the influence of alcohol or a specified chemical or controlled substance and causes damage to property or person, serious bodily injury, or death to another human being or unborn quick child, a rebuttable presumption is created that the person caused or contributed to causing damage to property or person, serious bodily injury, or death to another human being or unborn quick child; amending s. 782.071, F.S.; providing that, if a person drives under the influence of alcohol or a specified chemical or controlled substance, a rebuttable presumption is created that the person operated a motor vehicle in a reckless manner likely to cause death or great bodily harm to another human being; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsections (1) and (3) of section 316.193, Florida Statutes, are amended to read:

316.193 Driving under the influence; penalties.--

(1) A person commits ~~is guilty of~~ the offense of driving under the influence and is subject to punishment as provided in subsection (2) if the person is driving or in actual physical control of a vehicle within this state and:

(a) The person is under the influence of alcoholic beverages, any chemical substance set forth in s. 877.111, or any substance controlled under chapter 893, when affected to the extent that the person's normal faculties are impaired;

(b) The person has a blood-alcohol level of 0.08 or more grams of alcohol per 100 milliliters of blood; or

(c) The person has a breath-alcohol level of 0.08 or more grams of alcohol per 210 liters of breath.

(3) Any person:

(a) Who is in violation of subsection (1);

(b) Who operates a vehicle; and

(c) Who, by reason of such operation, causes or contributes to causing:

1. Damage to the property or person of another commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

2. Serious bodily injury to another, as defined in s. 316.1933, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

3. The death of any human being or unborn quick child commits DUI manslaughter, and commits:

a. A felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

b. A felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if:

(I) At the time of the crash, the person knew, or should have known, that the crash occurred; and

(II) The person failed to give information and render aid as required by s. 316.062.

For purposes of this paragraph, any person who violates subsection (1) creates a rebuttable presumption that he or she caused or contributed to causing damage to the person or property of another, serious bodily injury to another, or death to another human being or unborn quick child.

For purposes of this subsection, the definition of the term "unborn quick child" shall be determined in accordance with the definition of viable fetus as set forth in s. 782.071.

Section 2. Section 782.071, Florida Statutes, is amended to read:

782.071 Vehicular homicide.--"Vehicular homicide" is the killing of a human being, or the killing of a viable fetus by any injury to the mother, caused by the operation of a motor vehicle by another in a reckless manner likely to cause the death of, or great bodily harm to, another.

(1) Vehicular homicide is:

(a) A felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(b) A felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if:

1. At the time of the accident, the person knew, or should have known, that the accident occurred; and

2. The person failed to give information and render aid as required by s. 316.062.

This paragraph does not require that the person knew that the accident resulted in injury or death.

(2) For purposes of this section, a fetus is viable when it becomes capable of meaningful life outside the womb through standard medical measures.

(3) For purposes of this section, any person who violates s. 316.193(1) creates a rebuttable presumption that he or she operated a motor vehicle in a reckless manner likely to cause death or great bodily harm to a human being.

(4) ~~(3)~~ A right of action for civil damages shall exist under s. 768.19, under all circumstances, for all deaths described in this section.

(5) ~~(4)~~ In addition to any other punishment, the court may order the person to serve 120 community service hours in a trauma center or hospital that regularly receives victims of vehicle accidents, under the supervision of a registered nurse, an emergency room physician, or an emergency medical technician pursuant to a voluntary community service program operated by the trauma center or hospital.

Section 3. This act shall take effect July 1, 2006.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1443 CS Construction Lien Law
SPONSOR(S): Russell; Traviesa
TIED BILLS: None **IDEN./SIM. BILLS:** SB 588

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee	7 Y, 0 N, w/CS	Blalock	Bond
2) Local Government Council	8 Y, 0 N, w/CS	Smith	Hamby
3) Justice Council			
4)			
5)			

SUMMARY ANALYSIS

This bill amends the Construction Lien Law to:

- Allow for the local building department to electronically deliver a summary of the Construction Lien Law to the property owner;
- Provide that a private provider performing inspection services may not perform or approve subsequent inspections until the applicant files by mail, facsimile, hand delivery, or any other means a certified copy of the recorded notice of commencement;
- Increase from $5,000 to $7,500 the amount of a direct contract to repair or replace an existing heating or air-conditioning system in which a Notice of Commencement need not be filed;
- Provide that an issuing authority or a building official may not require that a notice of commencement be recorded as a condition of the application, processing, or issuance of a building permit;
- Authorize authorities issuing building permits to accept permit applications electronically and require an electronic application to include a sworn electronic submission statement;
- Require that an authority responsible for issuing building permit applications, which accepts building permit applications in an electronic format, provide public Internet access to the electronic building permit applications in a searchable format;
- Provide that when notices or other documents are sent by overnight or second-day delivery, evidence of delivery may be in electronic format.
- Provide procedures for determining the effective date of the service of notice when the notice was served electronically; and
- Provide that any person, firm, or corporation that furnishes a waiver or release of lien, or other documents containing false information, commits a third degree felony.

This bill does not appear to have a fiscal impact on state or local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government -- This bill amends construction lien law to both increase and decrease regulation.

B. EFFECT OF PROPOSED CHANGES:

Background

Section 713.13, F.S., provides that the recording of a notice of commencement gives constructive notice that claims of lien may be recorded and may take priority. It does not constitute a lien, cloud, or encumbrance on real property.[1]

Liens for professional services and subdivision improvements attach at the time they are recorded and take priority at that time.[2] Liens of materialmen or laborers who are in privity with the owner and who comply with the provisions of ch. 713, F.S., attach and take priority at the time the notice of commencement is recorded. However, in the event a notice of commencement is not filed, the liens attach and take priority at the time the claim of lien is recorded.

A notice of commencement must be recorded in the clerk's office before a contractor actually begins an improvement to real property or recommences completion of any improvement after default or abandonment. The notice must provide:

- A description of the real property;
- A general description of the improvement;
- Name and address of the owner, the owner's interest in the site of the improvement, and the name and address of the fee simple titleholder, if other than the owner;
- The name and address of the contractor;
- The name and address of the surety on the payment bond, if any, and the amount of the bond (a copy of the bond must be attached to the notice; however, if the bond is not recorded it may be used as a transfer bond under s. 713.24, F.S.);[3]
- The name and address of any person making a loan for the construction of the improvements; and
- The name and address of a designated person upon whom documents may be served if other than the owner.

As a pre-requisite to perfecting a lien and recording a claim of lien, all lienors who are not in privity with the owner, except laborers, must serve a notice on the owner.[4] A notice to the owner provides the identity of all persons that have furnished labor or materials to improve the owner's property. The notice to the owner protects the owner from double payment and establishes priority of lien.[5]
When final payment under a direct contract is due, the contractor must provide the owner a final payment affidavit. The contractor's final payment affidavit must state that all lienors under direct contract have been paid in full, or if not paid in full, stating the name of each lienor that has not been

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[1] Section 713.13(3), F.S.
[2] Section 713.07, F.S.
[3] Section 713.13(1)(e), F.S. A transfer bond allows an owner, who has erred and not recorded the bond with the notice of commencement, to transfer liens which are recorded against the owner's property. A lien may be transferred from the real property by depositing the amount required by s. 713.24(3), F.S., with the Clerk of the Court or by filing a surety bond in that amount with the clerk.
[4] Section 713.06(2)(a), F.S.
[5] Section 713.06, F.S.

paid in full and the amount due. Those lienors that fail to provide a notice to the owner may lose their lien rights if the owner makes proper payments.[6]

After receipt of a lienor notice to the owner,[7] an owner must make proper payments to the lienor. Proper payment means the owner pays all lienors named in the notice directly.[8] Similarly, when an owner receives a contractor's final payment affidavit, the owner must make proper payments to the contractor. Owners that make these payments will have a proper payment defense against any claim of lien. The notice of commencement must state if the contract between the owner and the contractor named in the notice is for construction or improvement that takes in excess of one year. Any payments made by the owner after the expiration of the notice are considered improper payments.

Effect of Proposed Changes

Requirements for Issuing Building Permits

Section 713.135(1), F.S., provides that when any person applies for a building permit, the authority issuing the permit is required to:

- Print on the face of each permit card a statement that the owner's failure to record a notice of commencement may result in the owner paying twice for improvements to the property;[9]
- Provide the applicant and the owner of the real property upon which improvements are to be constructed with a printed statement stating that the right, title, and interest of the person who has contracted for the improvement may be subject to attachment under the construction lien law. The authority must also provide the applicant with a statement from the department providing a summary of construction lien law. The authority must mail the statement to the owner;[10] and
- Inform each applicant who is not the person whose right, title, and interest is subject to attachment, that as a condition to the issuance of a building permit, the applicant must promise in good faith that the statement will be delivered to the person whose property is subject to attachment.

Section 713.135(1)(d), F.S., provides that a Notice of Commencement is not required in direct contracts to repair or replace an existing heating or air-conditioning system in an amount less than $5,000.

This bill amends s. 713.135(1)(b), F.S., to require that the building permit issuing authority must mail, deliver by electronic mail or other electronic format or facsimile, or personally deliver the statement required a summary of the Construction Lien Law to the owner or personally deliver the summary to the owner or, if the owner is required to personally appear to obtain the permit , provide the summary to any owner making improvements to real property.

This bill amends s. 713.135 (1)(d), F.S., to provide that in addition to a building permit issuing authority, a private provider performing inspection services may not perform or approve subsequent inspections until the applicant files by mail, facsimile, hand delivery, or any other means a certified copy of the recorded notice of commencement.

This bill also amends s. 713.135(1)(d), F.S., by increasing the amount from $5,000 to $7,500 in direct contracts to repair or replace an existing heating or air-conditioning system in which a Notice of Commencement need not be filed.

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[6] Section 713.06(3)(d), F.S.
[7] The notice to owner must be served no later then 45 days from commencing services to the property and before the date of the owner's final payment after the contractor has furnished the required final payment affidavit. s. 713.06(2)(a), F.S.
[8] Section 713.06, F.S.
[9] Section 713.135(1)(a), F.S.
[10] Section 713.135(1)(b), F.S.

This bill amends s. 713.135(1)(e), F.S., by providing that an issuing authority or a building official may not require that a notice of commencement be recorded as a condition of the application, processing, or issuance of a building permit. It provides that the paragraph does not modify or waive the inspection requirements set forth in the subsection.

This bill amends s. 713.135(4), F.S., to conform with the electronic mail provisions in the new s. 713.135(6)(b), F.S.

This bill amends s. 713.135(6)(b) and (c), F.S., to authorize authorities issuing building permits to accept permit applications electronically. It requires an electronic application to include a sworn electronic submission statement. This bill also requires that an authority responsible for issuing building permit applications that accepts building permit applications in an electronic format provide public Internet access to the electronic building permit applications in a searchable format.

Procedures for Serving Notices and Other Instruments

Section 713.18, F.S., provides that service of notices and other documents required under the Construction Lien Law must be made by actual delivery to the person to be served; or if a partnership, to one of the partners; or, if a corporation, to an officer, director, managing agent, or business agent thereof.[11] If service of notices by actual delivery or by mail cannot be accomplished, then posting on the premises is permitted.[12]

Section 713.18(1)(b), F.S., provides that notice may be sent by registered or certified mail, with postage prepaid, or by overnight or second-day delivery with evidence of delivery.[13] If a notice to an owner, is mailed by registered or certified mail with postage prepaid to the person to be served, within 40 days after the date the lienor first furnishes labor, services, or materials, service of that notice is effective as of the date of mailing if the person who served the notice maintains a registered or certified mail log that shows:[14] (1) the registered or certified mail number issued by the United States Postal Service; (2) the name and address of the person served; and (3) the date stamp of the United States Postal Service confirming the date of mailing.

This bill amends s. 713.18(1)(b), F.S., to provide that evidence of delivery of documents that are sent by overnight or second day delivery with postage paid as required under Construction Lien Law can be in electronic format.

This bill also amends s. 713.18(1)(b), F.S., to provide that where the person who served notice maintains electronic tracking records generated through the United States Postal Service, containing the postal tracking number, the service of notice is effective as of the date of mailing, if the person shows the name and address of the person served, and verification of the date of receipt by the United States Postal Service.

Making or Furnishing False Statement

Section 713.35, F.S., provides that if any person, firm, or corporation knowingly and intentionally furnishes to another person, firm, or corporation a written statement in the form of an affidavit containing false information about the payment status of subcontractors, sub-subcontractors, or suppliers in connection with the improvement of real property in this state, and that person relies on the information to his detriment, then that person is guilty of a felony of the third degree.[15]

The bill amends s. 713.35, F.S., by revising the list of legal documents to include a waiver or release of lien, or other document in which it is a third-degree felony to knowingly and intentionally include certain

[11] Section 713.18(1)(a), F.S.
[12] Section 713.18(1)(c), F.S.
[13] Section 713.18(1)(b), F.S.
[14] Section 713.18(1)(b), F.S.
[15] Section 713.35, F.S.

false information about the payment status of subcontractors, sub-subcontractors, or suppliers in connection with the improvement of real property.

C. SECTION DIRECTORY:

Section 1 amends s. 713.135, F.S., relating to the notice of commencement and applicability of a lien.

Section 2 amends s. 713.18, F.S., relating to the use of electronic mailing and other formats for serving notices, claims of lien, affidavits, and other documents required by the Construction Lien Law.

Section 3 amends s. 713.35, F.S., relating to the making or furnishing a false statement.

Section 4 provides an effective date of October 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

The Civil Justice Committee adopted two amendments on March 28, 2006. The first amendment provided that evidence of delivery of service of notices, claims of lien, affidavits, and other documents required by the Construction Lien Law may be in an electronic format when notice is sent by overnight or second-day delivery. The second amendment provided procedures for determining the effective date of a service of notice when the notice was served electronically and the person who served the notice maintains electronic tracking records. The bill, as amended, was reported favorably with committee substitute.

The Council on Local Government adopted one amendment on April 5, 2006. The amendment clarifies that the electronic application is in lieu of the paper application. Without the amendment, it is possible that a building official would accept the electronic application, but then still ask for a paper application. The bill, as amended, was reported favorably with committee substitute.

CHAMBER ACTION

The Local Government Council recommends the following:

Council/Committee Substitute

Remove the entire bill and insert:

A bill to be entitled

An act relating to the Construction Lien Law; amending s. 713.135, F.S.; revising certain notice of commencement and applicability of lien requirements for certain authorities issuing building permits; prohibiting private providers performing inspection services from performing or approving certain inspections under certain circumstances; increasing a threshold amount for certain application requirement exemptions; prohibiting issuing authorities from requiring recordation of a notice of commencement for certain purposes; authorizing fees for furnishing copies of certain statements; authorizing authorities issuing building permits to accept permit applications electronically; requiring an electronic submission statement on building permit applications; requiring provision of Internet access; amending s. 713.18, F.S.; providing for electronic evidence of delivery of notices required by the Construction Lien Law; amending s. 713.35, F.S.; revising provisions relating to the making or

furnishing of false statements on certain construction documents; providing penalties; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraphs (b) and (d) of subsection (1) and subsections (4) and (6) of section 713.135, Florida Statutes, are amended, and paragraph (e) is added to subsection (1) of that section, to read:

713.135 Notice of commencement and applicability of lien.--

(1) When any person applies for a building permit, the authority issuing such permit shall:

(b) Provide the applicant and the owner of the real property upon which improvements are to be constructed with a printed statement stating that the right, title, and interest of the person who has contracted for the improvement may be subject to attachment under the Construction Lien Law. The Department of Business and Professional Regulation shall furnish, for distribution, the statement described in this paragraph, and the statement must be a summary of the Construction Lien Law and must include an explanation of the provisions of the Construction Lien Law relating to the recording, and the posting of copies, of notices of commencement and a statement encouraging the owner to record a notice of commencement and post a copy of the notice of commencement in accordance with s. 713.13. The statement must also contain an explanation of the

owner's rights if a lienor fails to furnish the owner with a notice as provided in s. 713.06(2) and an explanation of the owner's rights as provided in s. 713.22. The authority that issues the building permit must obtain from the Department of Business and Professional Regulation the statement required by this paragraph and must mail, deliver by electronic mail or other electronic format or facsimile, or personally deliver that statement to the owner or, in a case in which the owner is required to personally appear to obtain the permit, provide that statement to any owner making improvements to real property consisting of a single or multiple family dwelling up to and including four units. However, the failure by the authorities to provide the summary does not subject the issuing authority to liability.

(d) Furnish to the applicant two or more copies of a form of notice of commencement conforming with s. 713.13. If the direct contract is greater than $2,500, the applicant shall file with the issuing authority prior to the first inspection either a certified copy of the recorded notice of commencement or a notarized statement that the notice of commencement has been filed for recording, along with a copy thereof. In the absence of the filing of a certified copy of the recorded notice of commencement, the issuing authority or a private provider performing inspection services may ~~shall~~ not perform or approve subsequent inspections until the applicant files by mail, facsimile, hand delivery, or any other means such certified copy with the issuing authority. The certified copy of the notice of commencement must contain the name and address of the owner, the

name and address of the contractor, and the location or address of the property being improved. The issuing authority shall verify that the name and address of the owner, the name of the contractor, and the location or address of the property being improved which is contained in the certified copy of the notice of commencement is consistent with the information in the building permit application. The issuing authority shall provide the recording information on the certified copy of the recorded notice of commencement to any person upon request. This subsection does not require the recording of a notice of commencement prior to the issuance of a building permit. If a local government requires a separate permit or inspection for installation of temporary electrical service or other temporary utility service, land clearing, or other preliminary site work, such permits may be issued and such inspections may be conducted without providing the issuing authority with a certified copy of a recorded notice of commencement or a notarized statement regarding a recorded notice of commencement. This subsection does not apply to a direct contract to repair or replace an existing heating or air-conditioning system in an amount less than $7,500 ~~$5,000~~.

(e) Not require that a notice of commencement be recorded as a condition of the application for or processing or issuance of a building permit. However, this paragraph does not modify or waive the inspection requirements set forth in this subsection.

(4) The several boards of county commissioners, municipal councils, or other similar bodies may by ordinance or resolution establish reasonable fees for furnishing copies of the forms and

the printed statement provided in paragraphs ~~paragraph~~ (1)(b) and (d) in an amount not to exceed $5 to be paid by the applicant for each permit in addition to all other costs of the permit; however, no forms or statement need be furnished, mailed, or otherwise provided to, nor may such additional fee be obtained from, applicants for permits in those cases in which the owner of a legal or equitable interest (including that of ownership of stock of a corporate landowner) of the real property to be improved is engaged in the business of construction of buildings for sale to others and intends to make the improvements authorized by the permit on the property and upon completion will offer the improved real property for sale.

(6)(a) In addition to any other information required by the authority issuing the permit, the building permit application must be in substantially the following form:

Tax Folio No._____

BUILDING PERMIT APPLICATION

Owner's Name

Owner's Address

Fee Simple Titleholder's Name (If other than owner)

Fee Simple Titleholder's Address (If other than owner)

City

State_____ Zip_____

Contractor's Name

Contractor's Address

City

State_____ Zip_____

Job Name

Job Address

City_____ County_____

Legal Description

Bonding Company

Bonding Company Address

City_____ State_____

Architect/Engineer's Name

Architect/Engineer's Address

Mortgage Lender's Name

Mortgage Lender's Address

Application is hereby made to obtain a permit to do the work and installations as indicated. I certify that no work or installation has commenced prior to the issuance of a permit and that all work will be performed to meet the standards of all laws regulating construction in this jurisdiction. I understand that a separate permit must be secured for ELECTRICAL WORK, PLUMBING, SIGNS, WELLS, POOLS, FURNACES, BOILERS, HEATERS, TANKS, and AIR CONDITIONERS, etc.

OWNER'S AFFIDAVIT: I certify that all the foregoing information is accurate and that all work will be done in compliance with all applicable laws regulating construction and zoning.

WARNING TO OWNER: YOUR FAILURE TO RECORD A NOTICE OF COMMENCEMENT MAY RESULT IN YOUR PAYING TWICE FOR IMPROVEMENTS TO YOUR PROPERTY.

IF YOU INTEND TO OBTAIN FINANCING, CONSULT WITH YOUR LENDER OR AN ATTORNEY BEFORE RECORDING YOUR NOTICE OF COMMENCEMENT.

(Signature of Owner or Agent)
(including contractor)

STATE OF FLORIDA
COUNTY OF _____

Sworn to (or affirmed) and subscribed before me this _____ day of _____, (year) , by (name of person making statement) .

(Signature of Notary Public - State of Florida)
(Print, Type, or Stamp Commissioned Name of Notary Public)

Personally Known _____ OR Produced Identification _____

Type of Identification Produced _____

(Signature of Contractor)

STATE OF FLORIDA

COUNTY OF _____

Sworn to (or affirmed) and subscribed before me this _____ day of _____, (year) , by (name of person making statement) .

(Signature of Notary Public - State of Florida)

(Print, Type, or Stamp Commissioned Name of Notary Public)

Personally Known _____ OR Produced Identification _____

Type of Identification Produced _____

(Certificate of Competency Holder)

Contractor's State Certification or Registration No._____

Contractor's Certificate of Competency No._____

APPLICATION APPROVED BY

_____ Permit Officer

(b) Consistent with the requirements of paragraph (a), an authority responsible for issuing building permits under this section may accept a building permit application in an electronic format, as prescribed by the authority. Building permit applications submitted to the authority electronically

must contain the following additional statement in lieu of the requirement in paragraph (a) that a signed, sworn, and notarized signature of the owner or agent and the contractor be part of the owner's affidavit:

OWNER'S ELECTRONIC SUBMISSION STATEMENT: Under penalty of perjury, I declare that all the information contained in this building permit application is true and correct.

(c) An authority responsible for issuing building permit applications which accepts building permit applications in an electronic format shall provide public Internet access to the electronic building permit applications in a searchable format.

Section 2. Paragraph (b) of subsection (1) of section 713.18, Florida Statutes, is amended to read:

713.18 Manner of serving notices and other instruments.--

(1) Service of notices, claims of lien, affidavits, assignments, and other instruments permitted or required under this part, or copies thereof when so permitted or required, unless otherwise specifically provided in this part, must be made by one of the following methods:

(b) By sending the same by registered or certified mail, with postage prepaid, or by overnight or second-day delivery with evidence of delivery, which may be in an electronic format.

1. If a notice to owner, a notice to contractor under s. 713.23, or a preliminary notice under s. 255.05 is mailed by registered or certified mail with postage prepaid to the person to be served at any of the addresses set forth in subparagraph

2. within 40 days after the date the lienor first furnishes labor, services, or materials, service of that notice is effective as of the date of mailing if the person who served the notice maintains a registered or certified mail log that shows the registered or certified mail number issued by the United States Postal Service, the name and address of the person served, and the date stamp of the United States Postal Service confirming the date of mailing or if the person who served the notice maintains electronic tracking records generated through use of the United States Postal Service Confirm service or a similar service containing the postal tracking number, the name and address of the person served, and verification of the date of receipt by the United States Postal Service.

2. If an instrument served pursuant to this section to the last address shown in the notice of commencement or any amendment thereto or, in the absence of a notice of commencement, to the last address shown in the building permit application, or to the last known address of the person to be served, is not received, but is returned as being "refused," "moved, not forwardable," or "unclaimed," or is otherwise not delivered or deliverable through no fault of the person serving the item, then service is effective on the date the notice was sent.

Section 3. Section 713.35, Florida Statutes, is amended to read:

713.35 Making or furnishing false statement.--Any person, firm, or corporation who knowingly and intentionally makes or furnishes to another person, firm, or corporation~~, a written~~

~~statement in the form of~~ an affidavit, a waiver or release of lien, or other document, whether or not under oath, containing false information about the payment status of subcontractors, sub-subcontractors, or suppliers in connection with the improvement of real property in this state, knowing that the one to whom it was furnished might rely on it, and the one to whom it was furnished will part with draw payments or final payment relying on the truth of such statement as an inducement to do so commits ~~is guilty of~~ a felony of the third degree, punishable as provided in s. 775.082 or s. 775.083. A state attorney or the statewide prosecutor, upon the filing of an indictment or information against a contractor, subcontractor, or sub-subcontractor which charges such person with a violation of this section, shall forward a copy of the indictment or information to the Department of Business and Professional Regulation. The Department of Business and Professional Regulation shall promptly open an investigation into the matter and, if probable cause is found, shall furnish a copy of any investigative report to the state attorney or statewide prosecutor who furnished a copy of the indictment or information and to the owner of the property which is the subject of the investigation.

Section 4. This act shall take effect October 1, 2006.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1577 Personal Identification Information
SPONSOR(S): Brandenburg
TIED BILLS: **IDEN./SIM. BILLS:** SB 1964

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Criminal Justice Committee	6 Y, 0 N	Ferguson	Kramer
2) Criminal Justice Appropriations Committee	5 Y, 0 N	Sneed	DeBeaugrine
3) Justice Council			
4)			
5)			

SUMMARY ANALYSIS

HB 1577 amends s. 817.568 F.S., related to criminal use of personal identification information (a.k.a. identity theft), by broadening the scope of the statute's reach. Specifically, it provides that it is a second degree felony for any person who willfully and fraudulently uses personal identification information of an individual who is 65 years of age or older without first obtaining consent. It further provides second degree felony penalties if the offense was committed using the personal identification information of a person who is 65 years of age or older, over which the offender has custodial authority.

The Criminal Justice Impact Conference met April 3, 2006 and concluded this bill would have an indeterminate, yet minimal, prison bed impact on the Department of Corrections.

This bill has an effective date of July 1, 2006.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government / Promote Personal Responsibility- This bill provides criminal penalties for fraudulent use of personal identification information of a person 65 years of age or older.

B. EFFECT OF PROPOSED CHANGES:

Currently, s. 817.568, F.S., provides that, "[a]ny person who willfully and without authorization fraudulently uses, or possesses with intent to fraudulently use, personal identification information[1] concerning an individual without first obtaining that individual's consent, commits" a third degree felony. This offense is commonly known as "identity theft". This section also provides for enhanced penalties as follows:

- If the value of the pecuniary benefit, services received or injury is $5,000 or more or if the person fraudulently uses the personal identification information of ten or more individuals without their consent, the offense is a second degree felony and the judge must impose a three year minimum mandatory term of imprisonment.

- If the value of the pecuniary benefit, services received or injury is $50,000 or more or if the person uses the personal identification information of 20 or more individuals, the offense is a first degree felony and the judge must impose a five year minimum mandatory sentence.

- If the value of the pecuniary benefit, services received or injury is $100,000 or more or if the person uses the personal identification information of 30 or more individuals, the offense is a first degree felony and the judge must impose of a ten year minimum mandatory sentence.

This section provides penalties for the offense of harassment[2] by use of personal identification information as well as using a public record to commit identity theft.[3] Further, this section also provides penalties if identity theft is committed using the personal identification information of an individual less than eighteen years of age[4]or an individual that is deceased.[5]

HB 1577 amends s. 817.568, F.S., to provide that it is a second degree felony[6] for any person who willfully and without authorization fraudulently uses personal identification information concerning an individual who is 65 years of age or older without first obtaining consent of that individual or of his or her legal guardian. It further provides for second degree felony penalties for a person who is in the

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[1] S. 817.568(f), F.S., defines "personal identification information" as "any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual, including any: 1) Name, postal or electronic mail address, telephone number, social security number, date of birth, mother's maiden name, official state-issued or United States-issued driver's license or identification number, alien registration number, government passport number, employer or taxpayer identification number, Medicaid or food stamp account number, bank account, credit or debit card number, or personal identification number or code assigned to the holder of a debit card by the issuer to permit authorized electronic use of such card; 2) Unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation; 3) Unique electronic identification number, address, or routing code; 4) Medical records; 5) Telecommunication identifying information or access device; or 6) Other number or information that can be used to access a person's financial resources."

[2] The term "harass" means to engage in conduct directed at a specific person that is intended to cause substantial emotional distress to such person and serves no legitimate purpose. S. 817.568(1)(c), F.S.

[3] S. 817.568(4) and (5), F.S.

[4] S. 817.568(6) and (7), F.S.

[5] S. 817.568(8), F.S.

[6] Punishable by a term of imprisonment not to exceeding 15 years and a fine of $10,000. ss. 775.082(3)(c) and 775.083(1)(b).

relationship of adult child or legal guardian, or who otherwise exercises custodial authority over an individual who is 65 years of age or older, who willfully and fraudulently uses personal identification information of that individual.

HB 1577 also amends the Criminal Punishment Code[7] to reflect these offenses. As such, identity theft of individual who is 65 years of age or older without first obtaining consent is ranked level 8 on the offense severity ranking chart[8], and identity theft of an individual who is 65 years of age or older, over which the offender has custodial authority is ranked level 9 on the offense severity ranking chart[9].

C. SECTION DIRECTORY:

Section 1. Amends s. 817.568, F.S., relating to criminal use of personal identification information.

Section 2. Amends s. 921.0022, F.S., conforming cross-references.

Section 3. Provides an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The Criminal Justice Impact Conference met April 3, 2006 and concluded this bill would have an indeterminate, yet minimal, prison bed impact on the Department of Corrections.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

[7] S. 921.0022, F.S.
[8] S. 921.0022(3)(h), F.S.
[9] S. 921.0021(3)(i), F.S.

The bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

A bill to be entitled

An act relating to personal identification information; amending s. 817.568, F.S.; providing that any person who willfully and without authorization fraudulently uses personal identification information concerning an individual who is 65 years of age or older without first obtaining the consent of the individual or of his or her legal guardian commits a felony of the second degree; providing criminal penalties; providing that a person who is in the relationship of adult child or legal guardian, or who otherwise exercises custodial authority over an individual who is 65 years of age or older, who willfully and fraudulently uses personal identification information of that individual commits a felony of the second degree; providing criminal penalties; amending s. 921.0022, F.S.; conforming cross-references; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsections (6) and (7) of section 817.568, Florida Statutes, are amended to read:

817.568 Criminal use of personal identification information.--

(6)(a) Any person who willfully and without authorization fraudulently uses personal identification information concerning an individual who is less than 18 years of age without first obtaining the consent of that individual or of his or her legal guardian commits a felony of the second degree, punishable as

provided in s. 775.082, s. 775.083, or s. 775.084.

(b) Any person who willfully and without authorization fraudulently uses personal identification information concerning an individual who is 65 years of age or older without first obtaining the consent of that individual or of his or her legal guardian commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(7)(a) Any person who is in the relationship of parent or legal guardian, or who otherwise exercises custodial authority over an individual who is less than 18 years of age, who willfully and fraudulently uses personal identification information of that individual commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(b) Any person who is in the relationship of adult child or legal guardian, or who otherwise exercises custodial authority over an individual who is 65 years of age or older, who willfully and fraudulently uses personal identification information of that individual commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Section 2. Paragraphs (h) and (i) of subsection (3) of section 921.0022, Florida Statutes, are amended to read:

921.0022 Criminal Punishment Code; offense severity ranking chart.--

(3) OFFENSE SEVERITY RANKING CHART

Florida Felony

Statute	Degree	Description
		(h) LEVEL 8
316.193 (3)(c)3.a.	2nd	DUI manslaughter.
316.1935(4)(b)	1st	Aggravated fleeing or attempted eluding with serious bodily injury or death.
327.35(3)(c)3.	2nd	Vessel BUI manslaughter.
499.0051(7)	1st	Forgery of prescription or legend drug labels.
499.0052	1st	Trafficking in contraband legend drugs.
560.123(8)(b)2.	2nd	Failure to report currency or payment instruments totaling or exceeding $20,000, but less than $100,000 by money transmitter.
560.125(5)(b)	2nd	Money transmitter business by unauthorized person, currency or payment instruments totaling or exceeding $20,000, but less than $100,000.

	655.50(10)(b)2.	2nd	Failure to report financial transactions totaling or exceeding $20,000, but less than $100,000 by financial institutions.
64	777.03(2)(a)	1st	Accessory after the fact, capital felony.
65	782.04(4)	2nd	Killing of human without design when engaged in act or attempt of any felony other than arson, sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawfully discharging bomb.
66	782.051(2)	1st	Attempted felony murder while perpetrating or attempting to perpetrate a felony not enumerated in s. 782.04(3).
67	782.071(1)(b)	1st	Committing vehicular homicide and failing to render aid or give information.
68	782.072(2)	1st	Committing vessel homicide and failing to render aid or give information.
69	790.161(3)	1st	Discharging a destructive device which results in bodily harm or property

			damage.
70	794.011(5)	2nd	Sexual battery, victim 12 years or over, offender does not use physical force likely to cause serious injury.
71	800.04(4)	2nd	Lewd or lascivious battery.
72	806.01(1)	1st	Maliciously damage dwelling or structure by fire or explosive, believing person in structure.
73	810.02(2)(a)	1st,PBL	Burglary with assault or battery.
74	810.02(2)(b)	1st,PBL	Burglary; armed with explosives or dangerous weapon.
75	810.02(2)(c)	1st	Burglary of a dwelling or structure causing structural damage or $1,000 or more property damage.
76	812.014(2)(a)2.	1st	Property stolen; cargo valued at $50,000 or more, grand theft in 1st degree.
77	812.13(2)(b)	1st	Robbery with a weapon.
78	812.135(2)(c)	1st	Home-invasion robbery, no firearm, deadly weapon, or other weapon.
79	817.568(6) (a)	2nd	Fraudulent use of personal

		identification information of an individual under the age of 18.
817.568(6)(b)	2nd	Fraudulent use of personal identification information of an individual 65 years of age or older.
825.102(2)	2nd	Aggravated abuse of an elderly person or disabled adult.
825.1025(2)	2nd	Lewd or lascivious battery upon an elderly person or disabled adult.
825.103(2)(a)	1st	Exploiting an elderly person or disabled adult and property is valued at $100,000 or more.
837.02(2)	2nd	Perjury in official proceedings relating to prosecution of a capital felony.
837.021(2)	2nd	Making contradictory statements in official proceedings relating to prosecution of a capital felony.
860.121(2)(c)	1st	Shooting at or throwing any object in path of railroad vehicle resulting in great bodily harm.
860.16	1st	Aircraft piracy.

893.13(1)(b)	1st	Sell or deliver in excess of 10 grams of any substance specified in s. 893.03(1)(a) or (b).
893.13(2)(b)	1st	Purchase in excess of 10 grams of any substance specified in s. 893.03(1)(a) or (b).
893.13(6)(c)	1st	Possess in excess of 10 grams of any substance specified in s. 893.03(1)(a) or (b).
893.135(1)(a)2.	1st	Trafficking in cannabis, more than 2,000 lbs., less than 10,000 lbs.
893.135 (1)(b)1.b.	1st	Trafficking in cocaine, more than 200 grams, less than 400 grams.
893.135 (1)(c)1.b.	1st	Trafficking in illegal drugs, more than 14 grams, less than 28 grams.
893.135 (1)(d)1.b.	1st	Trafficking in phencyclidine, more than 200 grams, less than 400 grams.
893.135 (1)(e)1.b.	1st	Trafficking in methaqualone, more than 5 kilograms, less than 25 kilograms.
893.135 (1)(f)1.b.	1st	Trafficking in amphetamine, more than 28 grams, less than 200 grams.

893.135 (1)(g)1.b.	1st	Trafficking in flunitrazepam, 14 grams or more, less than 28 grams.
893.135 (1)(h)1.b.	1st	Trafficking in gamma-hydroxybutyric acid (GHB), 5 kilograms or more, less than 10 kilograms.
893.135 (1)(j)1.b.	1st	Trafficking in 1,4-Butanediol, 5 kilograms or more, less than 10 kilograms.
893.135 (1)(k)2.b.	1st	Trafficking in Phenethylamines, 200 grams or more, less than 400 grams.
895.03(1)	1st	Use or invest proceeds derived from pattern of racketeering activity.
895.03(2)	1st	Acquire or maintain through racketeering activity any interest in or control of any enterprise or real property.
895.03(3)	1st	Conduct or participate in any enterprise through pattern of racketeering activity.
896.101(5)(b)	2nd	Money laundering, financial transactions totaling or exceeding $20,000, but less than $100,000.

896.104(4)(a)2.	2nd	Structuring transactions to evade reporting or registration requirements, financial transactions totaling or exceeding $20,000 but less than $100,000.
		(i) LEVEL 9
316.193 (3)(c)3.b.	1st	DUI manslaughter; failing to render aid or give information.
327.35(3)(c)3.b.	1st	BUI manslaughter; failing to render aid or give information.
499.00535	1st	Sale or purchase of contraband legend drugs resulting in great bodily harm.
560.123(8)(b)3.	1st	Failure to report currency or payment instruments totaling or exceeding $100,000 by money transmitter.
560.125(5)(c)	1st	Money transmitter business by unauthorized person, currency, or payment instruments totaling or exceeding $100,000.
655.50(10)(b)3.	1st	Failure to report financial transactions totaling or exceeding $100,000 by financial institution.

775.0844	1st	Aggravated white collar crime.
782.04(1)	1st	Attempt, conspire, or solicit to commit premeditated murder.
782.04(3)	1st,PBL	robbery, burglary, and other specified felonies.
782.051(1)	1st	Attempted felony murder while perpetrating or attempting to perpetrate a felony enumerated in s. 782.04(3).
782.07(2)	1st	Aggravated manslaughter of an elderly person or disabled adult.
787.01(1)(a)1.	1st,PBL	Kidnapping; hold for ransom or reward or as a shield or hostage.
787.01(1)(a)2.	1st,PBL	Kidnapping with intent to commit or facilitate commission of any felony.
787.01(1)(a)4.	1st,PBL	Kidnapping with intent to interfere with performance of any governmental or political function.
787.02(3)(a)	1st	False imprisonment; child under age 13; perpetrator also commits aggravated child abuse, sexual battery, or lewd or lascivious

			battery, molestation, conduct, or exhibition.
122	790.161	1st	Attempted capital destructive device offense.
123	790.166(2)	1st,PBL	Possessing, selling, using, or attempting to use a weapon of mass destruction.
124	794.011(2)	1st	Attempted sexual battery; victim less than 12 years of age.
125	794.011(2)	Life	Sexual battery; offender younger than 18 years and commits sexual battery on a person less than 12 years.
126	794.011(4)	1st	Sexual battery; victim 12 years or older, certain circumstances.
127	794.011(8)(b)	1st	Sexual battery; engage in sexual conduct with minor 12 to 18 years by person in familial or custodial authority.
128	800.04(5)(b)	Life	Lewd or lascivious molestation; victim less than 12 years; offender 18 years or older.
129	812.13(2)(a)	1st,PBL	Robbery with firearm or other deadly

			weapon.
130	812.133(2)(a)	1st,PBL	Carjacking; firearm or other deadly weapon.
131	812.135(2)(b)	1st	Home-invasion robbery with weapon.
132	817.568(7)(a)	2nd,PBL	Fraudulent use of personal identification information of an individual under the age of 18 by his or her parent, legal guardian, or person exercising custodial authority.
133	817.568(7)(b)	2nd	Fraudulent use of personal identification information of an individual 65 years of age or older by his or her adult child, legal guardian, or person exercising custodial authority.
134	827.03(2)	1st	Aggravated child abuse.
135	847.0145(1)	1st	Selling, or otherwise transferring custody or control, of a minor.
136	847.0145(2)	1st	Purchasing, or otherwise obtaining custody or control, of a minor.
137	859.01	1st	Poisoning or introducing bacteria, radioactive materials, viruses, or

			chemical compounds into food, drink, medicine, or water with intent to kill or injure another person.
138	893.135	1st	Attempted capital trafficking offense.
139	893.135(1)(a)3.	1st	Trafficking in cannabis, more than 10,000 lbs.
140	893.135 (1)(b)1.c.	1st	Trafficking in cocaine, more than 400 grams, less than 150 kilograms.
141	893.135 (1)(c)1.c.	1st	Trafficking in illegal drugs, more than 28 grams, less than 30 kilograms.
142	893.135 (1)(d)1.c.	1st	Trafficking in phencyclidine, more than 400 grams.
143	893.135 (1)(e)1.c.	1st	Trafficking in methaqualone, more than 25 kilograms.
144	893.135 (1)(f)1.c.	1st	Trafficking in amphetamine, more than 200 grams.
145	893.135 (1)(h)1.c.	1st	Trafficking in gamma-hydroxybutyric acid (GHB), 10 kilograms or more.
146	893.135 (1)(j)1.c.	1st	Trafficking in 1,4-Butanediol, 10 kilograms or more.
147	893.135	1st	Trafficking in Phenethylamines, 400

	(1)(k)2.c.		grams or more.
148			
	896.101(5)(c)	1st	Money laundering, financial instruments totaling or exceeding $100,000.
149			
	896.104(4)(a)3.	1st	Structuring transactions to evade reporting or registration requirements, financial transactions totaling or exceeding $100,000.
150			

151 Section 3. This act shall take effect July 1, 2006.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1593 Cybercrime
SPONSOR(S): Barreiro
TIED BILLS: **IDEN./SIM. BILLS:** SB 2322

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Criminal Justice Committee	6 Y, 0 N	Ferguson	Kramer
2) Criminal Justice Appropriations Committee	6 Y, 0 N	Sneed	DeBeaugrine
3) Justice Council			
4)			
5)			

SUMMARY ANALYSIS

HB 1593 creates s. 16.61, F.S., establishing a Cybercrime Unit (Unit) in the Department of Legal Affairs within the Office of the Attorney General. This Unit is authorized to investigate violations of state law pertaining to the sexual exploitation of children which are facilitated by or connected to the use of any device capable of storing electronic data.

This bill provides the law enforcement officers in the Unit with the authority to conduct criminal investigations, execute search warrants, bear arms and make arrests related to cybercrimes.

The bill would increase workload for the Department of Legal Affairs, but the department indicates that it has the necessary investigative positions in place to accommodate the increased workload.

This act shall take effect upon becoming law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

This bill does not appear to implicate any of the House Principles.

B. EFFECT OF PROPOSED CHANGES:

Background

According to the Attorney General's website[1]:

> In 2005, Attorney General Charlie Crist established a Cybercrime Unit to expand programs to further safeguard children from predatory criminals. The Unit includes law enforcement investigators and prosecutors whose primary mission is to target child predators, child pornography, and Internet-based sexual exploitation of children.
>
> The Cybercrime Unit is dedicated to investigating and prosecuting any crime perpetrated or substantially facilitated using a computer, the Internet, digital media, cellular phone, personal digital assistant (PDA), or any other electronic device. The investigators and the prosecutors in the Unit are specially trained in current technologies, tactics, and the law, and share their expertise through educational programs and community awareness efforts.
>
> Through the Cybercrime Unit, the Attorney General encourages extensive cooperative efforts with federal and state prosecutors, the Florida Department of Law Enforcement (FDLE), the NetSmartz Workshop, the National Center for Missing and Exploited Children (NCMEC), other Attorneys General, and all Florida law enforcement agencies.

The Cybercrime Unit is not currently referenced in Florida Statutes. For fiscal year 2005-2006, the Legislature funded 4 positions (3 investigators and one senior assistant attorney) for this cybercrime unit from the Legal Affairs Revolving Trust Fund[2].

Effect of Bill

HB 1593 creates s. 16.61, F.S., to provide a Cybercrime Unit (Unit) in the Department of Legal Affairs within the Office of the Attorney General. Essentially, this bill will codify the Cybercrime unit Attorney General Charlie Crist established in 2005.

This bill will authorize the Unit to investigate violations of state law pertaining to the sexual exploitation of children which are facilitated by or connected to the use of any device capable of storing electronic data. Violators of this bill will be prosecuted by the Statewide Prosecutor if the offense occurs in more than one judicial circuit; otherwise, the State Attorney in their respective circuit in conjunction with the Statewide Prosecutor will prosecute the offender.

This bill also provides that:

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[1] http://myfloridalegal.com/

[2] According to staff on the Senate Justice Appropriations Committee, the total appropriation was $416,030 ($72,683 of which was non-recurring).

- Investigators employed by the Cybercrime Unit who are certified in accordance with s. 943.1395, F.S., are law enforcement officers of the state who shall have the authority to conduct criminal investigations, bear arms, make arrests, and apply for, serve, and execute search warrants, arrest warrants, capias, and all necessary service of process throughout the state.[3]

- In carrying out the duties and responsibilities of this section, the Attorney General, or any duly designated employee, is authorized to subpoena witnesses or materials within or outside the state, administer oaths and affirmations, and collect evidence for possible use in civil or criminal judicial proceedings; and seek any civil remedy provided by law, including, but not limited to, a remedy provided under s. 932.701, F.S.[4]

- The Attorney General, or any duly designated employee, shall provide notice to the local sheriff, or his or her designee, of any arrest effected by the Cybercrime Unit.

C. SECTION DIRECTORY:

Section 1. Creates s. 16.61, F.S., the Cybercrime Unit.

Section 2. Provides this act shall take effect upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   There is increased workload associated with the new responsibilities. The Legislature, however, established 4 FTE and provided $411,350 for the Cybercrime Unit during FY 2005-06. Funding for the Cybercrime Unit is continued in the House proposed General Appropriations Act for FY 2006-07. This bill makes the investigators sworn law enforcement which will move them from regular retirement to special risk.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

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[3] According to staff in the Office of the Attorney General, investigators in the Cybercrime Unit are certified law enforcement officers. They are authorized to conduct criminal investigations, bear arms, make arrests, and apply for, serve, and execute search warrants, arrest warrants, capias, and all necessary service of process throughout the state. The bill specifically codifies this authority.

[4] According to staff in the Office of the Attorney General, the Attorney General and the referenced "duly designated employee" are authorized to subpoena witnesses or materials within or outside the state, administer oaths and affirmations, and collect evidence for possible use in civil or criminal judicial proceedings; and seek any civil remedy provided by law, including, but not limited to, a remedy provided under s. 932.701, F.S. The bill specifically codifies this authority.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require the counties or cities to spend funds or take an action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

A bill to be entitled

An act relating to cybercrime; creating s. 16.61, F.S.; creating a Cybercrime Unit within the Department of Legal Affairs; providing for powers, duties, and personnel of the unit; requiring notice to sheriffs of arrests by the unit in their jurisdictions; providing an effective date.

WHEREAS, the use of computers or devices capable of storing electronic data for the criminal purposes of spreading child pornography and engaging in the sexual exploitation and predation of children has greatly increased in this state, and

WHEREAS, special training and expertise is needed for the effective investigation of these crimes, and

WHEREAS, the impact of these crimes stretches across all jurisdictions of this state creating unique burdens on local law enforcement and local prosecutors, NOW, THEREFORE,

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 16.61, Florida Statutes, is created to read:

16.61 Cybercrime Unit.--

(1) A Cybercrime Unit is created in the Department of Legal Affairs. This office may investigate alleged violations of state law pertaining to sexual exploitation and predation of children that is either facilitated by or connected to the use of any device capable of storing electronic data.

(2) Investigators employed by the Cybercrime Unit who are certified in accordance with s. 943.1395 shall be law enforcement officers of the state. These investigators shall have the authority to conduct criminal investigations; bear arms; make arrests; and apply for, serve, and execute search warrants, arrest warrants, capias, and all necessary service of process throughout the state.

(3) In carrying out the duties and responsibilities of this section, the Attorney General, or any duly designated employee of the Cybercrime Unit, may:

(a) Subpoena witnesses or materials, within or outside the state, administer oaths and affirmations, and collect evidence for possible use in either civil or criminal judicial proceedings.

(b) Seek any civil remedy provided by law, including, but not limited to, the Florida Contraband Forfeiture Act, ss. 932.701-932.707.

(4) The Attorney General, or a duly designated employee of the Cybercrime Unit, shall provide notice to the local sheriff, or his or her designee, of any arrest effected by the Cybercrime Unit in the sheriff's jurisdiction.

Section 2. This act shall take effect upon becoming a law.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 7021 (PCB CRJU 06-02) Stolen Property
SPONSOR(S): Criminal Justice Committee
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Criminal Justice Committee	6 Y, 0 N	Cunningham	Kramer
1) Criminal Justice Appropriations Committee	4 Y, 0 N	DeBeaugrine	DeBeaugrine
2)			
3)			
4)			
5)			

SUMMARY ANALYSIS

HB 7021 provides that proof that a person was in possession of a stolen motor vehicle and that the ignition mechanism of the motor vehicle had been bypassed or the steering wheel locking mechanism had been broken or bypassed gives rise to an inference that the person in possession of the stolen motor vehicle knew or should have known that the motor vehicle had been stolen.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Promote Personal Responsibility – The bill provides that certain evidence creates an inference of proof relating to theft of a motor vehicle.

B. EFFECT OF PROPOSED CHANGES:

Theft → Section 812.014, F.S., provides that a person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or use, the property of another with intent to, either temporarily or permanently:

1. Deprive the other person of a right to the property or a benefit from the property, or
2. Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.[1]

Section 812.014, F.S., provides in part that, except as provided for in s. 812.014(2)(a), F.S.,[2] it is grand theft of the third degree and a third degree felony if the property stolen is a motor vehicle.

Dealing in Stolen Property → Section 812.019, F.S., provides that any person who traffics[3] in, or endeavors to traffic in, property that he or she knows or should know was stolen commits a second degree felony. Any person who initiates, organizes, plans, finances, directs, manages, or supervises the theft of property and traffics in such stolen property commits a first degree felony.

An offender can be charged, when appropriate, with theft and dealing in stolen property in connection with the same property but cannot be convicted of both offenses.[4]

Inferences → Section 812.022, F.S. provides several inferences relating to evidence of theft or dealing in stolen property such as:

- Except as provided in s. 812.022(5), F.S., proof of possession of property recently stolen, unless satisfactorily explained, gives rise to an inference that the person in possession of the property knew or should have known that the property had been stolen.
- Proof of the purchase or sale of stolen property at a price substantially below the fair market value, unless satisfactorily explained, gives rise to an inference that the person buying or selling the property knew or should have known that the property had been stolen.
- Proof of the purchase or sale of stolen property by a dealer in property, out of the regular course of business or without the usual indicia of ownership other than mere possession, unless satisfactorily

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[1] Section 812.012, F.S. contains definitions of the terms "obtains or uses", "property". The section also defines the term "property of another" to mean "property in which a person has an interest upon which another person is not priviledged to infringe without consent, whether or not the other person also has an interest in the property."

[2] Section 812.014(2)(a), F.S., provides that an offender commits grand theft of the first degree and a first degree felony if:

1. the property stolen is valued at $100,000 or more; or
2. the property stolen is cargo valued at $50,000 or more that has entered the stream of interstate or intrastate commerce from the shipper's loading platform to the consignee's receiving dock; or
3. the offender commits any grand theft and:
   a. In the course of committing the offense the offender uses a motor vehicle as an instrumentality, other than merely as a getaway vehicle, to assist in committing the offense and thereby damages the real property of another; or
   b. In the course of committing the offense the offender causes damage to the real or personal property of another in excess of $1,000.

[3] Section 812.012(8), F.S. contains a definition of the term "traffic".

[4] s. 812.025, F.S.

explained, gives rise to an inference that the person buying or selling the property knew or should have known that it had been stolen.

In *Edwards v. State*, 381 So.2d 696 (Fla. 1980), the court considered whether the inference relating to proof of possession of recently stolen property violated a defendant's due process rights. The court held that "[s]ince there is a rational connection between the fact proven (the defendant possessed stolen goods) and the fact presumed (the defendant knew the goods were stolen), the inference created by section 812.022(2) does not violate [a defendant's] due process rights." *See also*, *Walker v. State*, 896 So.2d 712 (Fla. 2005).

Effect of HB 7021 → HB 7021 amends section 812.022, F.S. to provide that proof that a person was in possession of a stolen motor vehicle and that the ignition mechanism of the motor vehicle had been bypassed or the steering wheel locking mechanism had been broken or bypassed gives rise to an inference that the person in possession of the stolen motor vehicle knew or should have known that the motor vehicle had been stolen.

C. SECTION DIRECTORY:

Section 1. Amends s. 812.022, F.S., to create an inference relating to stolen vehicles.

Section 2. This acts takes effect October 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

A bill to be entitled

An act relating to stolen property; amending s. 812.022, F.S.; providing that specified circumstances give rise to an inference that the person in possession of a stolen motor vehicle knew or should have known that the motor vehicle had been stolen; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (6) is added to section 812.022, Florida Statutes, to read:

812.022 Evidence of theft or dealing in stolen property.--

(6) Proof that a person was in possession of a stolen motor vehicle and that the ignition mechanism of the motor vehicle had been bypassed or the steering wheel locking mechanism had been broken or bypassed gives rise to an inference that the person in possession of the stolen motor vehicle knew or should have known that the motor vehicle had been stolen.

Section 2. This act shall take effect July 1, 2006.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HJR 7037 CS PCB JU 06-02 Extraordinary Vote to Amend Constitution to Increase or Impose Taxes, Fees, or Significant Financial Impact
SPONSOR(S): Judiciary Committee
TIED BILLS: **IDEN./SIM. BILLS:** CS/SJR 1436

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Judiciary Committee	12 Y, 2 N	Thomas	Hogge
1) Finance & Tax Committee	7 Y, 1 N, w/CS	Levin	Diez-Arguelles
2)			
3)			
4)			
5)			

SUMMARY ANALYSIS

The joint resolution proposes changes to Section 7 of Article XI of the Florida Constitution. Article XI addresses amendments to the constitution, and Section 7 specifically addresses tax or fee limitations. The joint resolution provides that the existing two-thirds vote required for voters to approve any constitutional amendment *imposing* a new state tax or fee be expanded to include any constitutional amendment or revision *increasing* an existing state tax or fee. The joint resolution clarifies the definition of "existing state tax or fee" to be any tax or fee that produces revenue to state government.

The joint resolution also requires that any proposed amendment or revision, regardless of the source of the proposal, that results in significant additional spending by state government in an amount greater than one-tenth of one percent of the total state budget as established in the General Appropriations Act approved by the Governor, for the state fiscal year ending in the calendar year prior to the year of the election in which such proposed amendment or revision is considered, must pass by at least two-thirds of those electors voting in the election in which such proposal is considered. Based on the FY 2005-06 budget, significant additional spending would be any amount greater than approximately $63 million.

The joint resolution does not appear to have any fiscal impact on state or local government other than those costs related to placing the joint resolution on the ballot and publishing required notices. The Department of State estimates non-recurring publication costs of approximately $50,000 for FY 2006-07.

The joint resolution does not contain a specific effective date. Therefore, if adopted by the voters, it will take effect on January 2, 2007.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Ensure lower taxes

Amendments to Florida's Constitution which increases taxes or fees or result in significant additional spending will require a two-thirds vote of the electorate in order to become effective.

B. EFFECT OF PROPOSED CHANGES:

Revision or Amendment to the Constitution

Amendments to Florida's Constitution can be proposed by five distinct methods: 1) joint legislative resolution, 2) the Constitutional Revision Commission, 3) citizen's initiative, 4) a constitutional convention, or 5) the Taxation and Budget Reform Commission.[1] Depending on the method, all proposed amendments or revisions to the constitution must be submitted to the electors at the next general election 1) held more than ninety days after the joint resolution, 2) 180 days after the report of the Constitutional Revision Commission or Taxation Budget Reform Commission, or 3) for citizen initiatives, if all the required signatures were submitted prior to February 1 of the year in which the general election is to be held.[2]

A proposed constitutional amendment or revision is adopted upon approval of a majority of electors voting on the proposal.[3] However, a new State tax or fee proposed by constitutional amendment or revision must be adopted by at least two-thirds of those voting in the election in which such amendment is considered.[4]Section 5, Article XI, of Florida's Constitution was amended in 2002 requiring the Legislature to provide a statement to the voters regarding the probable financial impact of any amendment proposed by initiative. In response, the Legislature created the Financial Impact Estimating Conference to review, analyze, and estimate the financial impact of amendments.[5]

Effect of Joint Resolution

The joint resolution proposes changes to Section 7 of Article XI of the Florida Constitution, relating to tax or fee limitations in amendments or revisions. The joint resolution provides that the existing two-thirds vote required for voters to approve any constitutional amendment or revision *imposing* a new state tax or fee be expanded to include any constitutional amendment or revision *increasing* an existing state tax or fee. The joint resolution clarifies the definition of "existing State tax or fee" to be any tax or fee that produces revenue for state government.

The joint resolution also requires that any proposed amendment or revision, regardless of the source of the proposal, that results in significant additional spending by state government in an amount greater than one-tenth of one percent of the total state budget as established by the General Appropriations Act approved by the Governor, for the state fiscal year ending in the calendar year prior to the year of the election in which such proposed amendment or revision is considered, must pass by at least two-thirds of those electors voting in the election in which such proposal was considered. Based on the FY 2005-06 budget, significant additional spending would be any amount greater than approximately $63 million.

The joint resolution further provides that the determination of whether a proposed amendment or revision requires significant additional spending by state government will be made and certified in

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[1] *See* Art. XI, ss. 1-4 & 6, Fla. Const.
[2] *See* Art. XI, ss. 2, 5, and 6, Fla. Const.
[3] *See* Art. XI, s. 5(e), Fla. Const.
[4] *See* Art. XI, s. 7, Fla. Const.
[5] *See* s. 100.371, F.S.

accordance with general law. The joint resolution also deletes obsolete language in this section of the state constitution relating to items on the November 8, 1994 ballot.

The joint resolution does not contain a specific effective date. Therefore, if adopted by the voters, it will take effect January 2, 2007.[6]

Below is a list of the approval percentages of some constitutional amendments in the past that might have required a two-thirds vote had this joint resolution been law.

TITLE	SOURCE	YEAR	APPROVAL PERCENTAGE
High Speed Rail	Initiative	2000	52.7%
Class Size	Initiative	2002	52.4%
Voluntary Pre-Kindergarten	Initiative	2002	59.2%
Article V – Local Funding of State Courts	Revision Commission	1998	56.9%

Appearance on the Ballot

If enacted, the proposed constitutional amendment will appear on the November 2006 ballot as follows:

> TWO-THIRDS VOTE FOR AMENDMENT INCREASING STATE TAX OR FEE OR RESULTING IN SIGNIFICANT ADDITIONAL SPENDING.— Under this measure proposing to amend the State Constitution, a proposed amendment or revision to the State Constitution that increases an existing state tax or fee would have to be approved by at least two-thirds of those voters voting in the election in which the amendment or revision is considered. For the purposes of this measure, "existing state tax or fee" means any tax or fee that produces revenue to state government. This measure would require that a proposed amendment or revision to the State Constitution that would result in significant additional spending by state government must be approved by at least two-thirds of those voters voting in the election in which the amendment or revision is considered. For the purposes of this measure, "significant additional spending" means additional spending in any state fiscal year prior to and including the first state fiscal year of full implementation, in an amount greater than one-tenth of one percent of the total state budget, as established in the General Appropriations Act approved by the Governor, for the state fiscal year ending in the calendar year prior to the year of the election in which such proposed amendment or revision is considered. The determination of whether a proposed amendment or revision would result in significant additional spending by state government would be made and certified in accordance with general law. This measure adds to an existing provision of the Florida Constitution, passed by Florida voters in 1996, that currently applies the same two-thirds vote requirement only to a proposed amendment that imposes a new state tax or fee. All other proposed amendments or revisions presently must be approved by only a simple majority of those voting on the proposal. The measure also makes conforming changes in this section of the State Constitution and repeals obsolete provisions relating to items on the November 8, 1994, ballot.

C. SECTION DIRECTORY:

[6] Art. XI, s. 5(e), Fla. Const., provides: "If the proposed amendment or revision is approved by vote of the electors, it shall be effective as an amendment to or revision of the constitution of the state on the first Tuesday after the first Monday in January following the election, or on such other date as may be specified in the amendment or revision."

The legislation is a joint resolution proposing a constitutional amendment and, therefore, does not contain bill sections. The joint resolution proposes to amend Section 7 of Article XI of the Florida Constitution relating to amendments and revisions.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

Non-Recurring		**FY 2006-07**
General Revenue	Publication Costs	$50,000

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

While this proposal does not have a direct economic impact on the private sector, requiring a higher voting threshold for proposed amendments and revisions that increase a state tax or fee or impose a significant financial impact on state government may affect the likelihood of success of future proposals. See Effect of Proposed Changes, Section I.B. of this analysis, for voting results on past amendments that might have been affected had this joint resolution been in effect at the time of their respective elections.

D. FISCAL COMMENTS:

The Florida Constitution requires publication of a proposed amendment or revision to the constitution in one newspaper of general circulation in each county in which a newspaper is published, once in the tenth week and once in the sixth week immediately preceding the week in which the election is held.[7] The Division of Elections with the Department of State estimates that the non-recurring cost of compliance would be approximately $50,000 in FY 2006-07.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   The mandates provision relates only to general bills and therefore would not apply to this joint resolution.

2. Other:

[7] *See* Art. XI, s. 5(c), Fla. Const.

None.

B. RULE-MAKING AUTHORITY:

The joint resolution does not raise the need for rules or rulemaking authority or direct an agency to adopt rules.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Amendments or revisions to the Florida Constitution may be proposed by joint resolution agreed to by three-fifths of the membership of each house of the Legislature.[8] Passage in a committee requires a simple majority vote. If the joint resolution is passed in this session, the proposed amendment would be placed before the electorate at the 2006 general election, unless it is submitted at an earlier special election pursuant to a law enacted by an affirmative vote of three-fourths of the membership of each house of the Legislature and is limited to a single amendment or revision.[9] Once in the tenth week, and once in the sixth week immediately preceding the week in which the election is held, the proposed amendment or revision, with notice of the date of election at which it will be submitted to the electors, must be published in one newspaper of general circulation in each county in which a newspaper is published.[10]

A similar proposal to this joint resolution passed the House of Representatives in the 2005 legislative session,[11] but was never considered by the Senate. Last year's proposal differed in that it applied to constitutional amendments or revisions that increased local taxes and fees, as well as to those that increased state taxes or fees and those that imposed a significant financial impact on state or local governments. This joint resolution only applies to constitutional amendments or revisions that increase state taxes or fees and those that impose a significant financial impact on state government. Last year's proposal passed unanimously out of the Judiciary Committee and the Justice Council, and by a 9 to 1 vote in the Ethics and Elections Committee.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On March 31, 2006 the Finance and Tax Committee adopted an amendment that clarified the definition for a new state tax or fee to be a tax or fee that produces revenue to the state government. The criteria requiring the two-thirds vote was changed from "significant financial impact" to "significant additional spending."

[8] *See* Art. XI, s. 1, Fla. Const.
[9] *See* Art. XI, s. 5(a), Fla. Const. The 2006 general election is on November 7, 2006.
[10] *See* Art. XI, s. 5(c), Fla. Const.
[11] See CS/HB 1741 (2005)

CHAMBER ACTION

The Finance & Tax Committee recommends the following:

Council/Committee Substitute

Remove the entire bill and insert:

House Joint Resolution

A joint resolution proposing an amendment to Section 7 of Article XI of the State Constitution, relating to state tax or fee limitations, to specify application to imposition of new state taxes or fees or increases in existing state taxes or fees that would produce revenues to state government and to include a limitation on any amendment or revision to the State Constitution that would result in significant additional spending by state government.

Be It Resolved by the Legislature of the State of Florida:

That the following amendment to Section 7 of Article XI of the State Constitution is agreed to and shall be submitted to the electors of this state for approval or rejection at the next general election or at an earlier special election specifically authorized by law for that purpose:

ARTICLE XI

AMENDMENTS

SECTION 7. Tax, ~~or~~ fee, or significant financial impact limitation.--Notwithstanding Article X, Section 12(d) of this constitution:~~,~~

(a) No amendment or revision to this constitution that imposes a new state tax or fee shall become effective ~~be imposed on or after November 8, 1994 by any amendment to this constitution~~ unless the proposed amendment or revision is approved by not fewer than two-thirds of the voters voting in the election in which such proposed amendment or revision is considered. For purposes of this subsection ~~section~~, the phrase "new state tax or fee" shall mean any tax or fee that ~~which~~ would produce revenue to state government. ~~subject to lump sum or other appropriation by the Legislature, either for the state general revenue fund or any trust fund, which tax or fee is not in effect on November 7, 1994 including without limitation such taxes and fees as are the subject of proposed constitutional amendments appearing on the ballot on November 8, 1994. This section shall apply to proposed constitutional amendments relating to State taxes or fees which appear on the November 8, 1994 ballot, or later ballots, and~~ Any such proposed amendment or revision that ~~which~~ fails to gain the two-thirds vote required by this subsection ~~hereby~~ shall be null, void, and without effect.

(b) No amendment or revision to this constitution that increases an existing state tax or fee shall become effective unless the proposed amendment or revision is approved by not fewer than two-thirds of the voters voting in the election in

which such proposed amendment or revision is considered. For purposes of this subsection, the phrase "existing state tax or fee" means any tax or fee that produces revenue to state government. Any such proposed amendment or revision that fails to gain the two-thirds vote required by this subsection shall be null, void, and without effect.

(c) No amendment or revision to this constitution that would result in significant additional spending by state government shall become effective unless the proposed amendment or revision is approved by not fewer than two-thirds of the voters voting in the election in which such proposed amendment or revision is considered. For purposes of this subsection, the phrase "significant additional spending" means additional spending by the state in any state fiscal year prior to and including the first state fiscal year of full implementation of the amendment or revision, in an amount greater than one-tenth of one percent of the total state budget, as established in the general appropriations act approved by the governor, for the state fiscal year ending in the calendar year prior to the year of the election in which such proposed amendment or revision is considered. The determination of whether a proposed amendment or revision would result in significant additional spending by state government shall be made and certified in accordance with general law. Any such proposed amendment or revision that fails to gain the two-thirds vote required by this subsection shall be null, void, and without effect.

BE IT FURTHER RESOLVED that the following statement be placed on the ballot:

CONSTITUTIONAL AMENDMENT

ARTICLE XI, SECTION 7

TWO-THIRDS VOTE FOR AMENDMENT INCREASING STATE TAX OR FEE OR RESULTING IN SIGNIFICANT ADDITIONAL SPENDING.--Under this measure proposing to amend the State Constitution, a proposed amendment or revision to the State Constitution that increases an existing state tax or fee would have to be approved by at least two-thirds of those voters voting in the election in which the amendment or revision is considered. For the purposes of this measure, "existing state tax or fee" means any tax or fee that produces revenue to state government. This measure would also require that a proposed amendment or revision to the State Constitution that would result in significant additional spending by state government must be approved by at least two-thirds of those voters voting in the election in which the amendment or revision is considered. For the purposes of this measure, "significant additional spending" means additional spending in any state fiscal year prior to and including the first state fiscal year of full implementation, in an amount greater than one-tenth of one percent of the total state budget, as established in the General Appropriations Act approved by the Governor, for the state fiscal year ending in the year prior to the election in which such proposed amendment or revision is considered. The determination of whether a proposed amendment or revision would result in significant additional spending by state government would be made and certified in accordance with general law. This measure adds to an existing provision of the Florida Constitution, passed by Florida voters in 1996, that

currently applies the same two-thirds vote requirement only to a proposed amendment that imposes a new state tax or fee. All other proposed amendments or revisions presently must be approved by only a simple majority of those voting on the proposal. The measure also makes conforming changes in this section of the State Constitution and repeals obsolete provisions relating to items on the November 8, 1994, ballot.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 7135 PCB CRJU 06-04 Youthful Offenders
SPONSOR(S): Criminal Justice Committee
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Criminal Justice Committee	7 Y, 0 N	Cunningham	Kramer
1) Criminal Justice Appropriations Committee	4 Y, 0 N	Sneed	DeBeaugrine
2)			
3)			
4)			
5)			

SUMMARY ANALYSIS

The Youthful Offender Act provides a sentencing alternative for an offender guilty of a non-capital or non-life felony that was committed before his or her 21st birthday. If classified as a youthful offender, the offender may only receive one of the following four types of sanctions: (1) probation or community control; (2) incarceration for up to 364 days, as a condition of probation or community control; (3) a split sentence that provides for incarceration followed by probation or community control; or (4) commitment to the custody of the Department of Corrections. The total sanction may not exceed six years.

The Department of Corrections must offer a basic training program for youthful offenders. If an offender successfully completes basic training, the court must place the offender on probation. If the offender later violates that probation, the court is limited to sentencing the offender to no more than 364 days in jail, rather than choosing one of the other sanctions originally available to the court in the youthful offender's case.

This bill amends s. 958.045(5)(c), F.S., to remove the phrase "as a condition of probation." This amendment will have the effect of removing the 364-day jail limit found to exist by Florida courts and will permit the court to sentence a youthful offender who has violated probation after completing basic training to any of the four sanctions that it could have originally imposed.

The Criminal Justice Impact Conference met on February 28, 2006 and determined that SB 1386, an identical bill, would have an indeterminate, yet minimal, fiscal impact on the prison bed population in the Department of Corrections. This bill might result in more probation violators being sentenced to longer sentences which would be served in prison rather than jail. Accordingly, prisons would experience an increase in their populations while jails might experience a decrease.

The bill takes effect on July 1, 2006.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Promotes Personal Responsibility → Under the bill, sanctions greater than those authorized in current law may be imposed by a trial court for an offender who has violated his or her probation following the completion of the Department of Correction's (DOC's) basic training program.

B. EFFECT OF PROPOSED CHANGES:

Youthful Offenders

The purpose of Florida's Youthful Offender Act is to provide a sentencing alternative[1] that will improve the chances for rehabilitation of an offender who: (1) is at least 18 years of age or has been transferred for criminal prosecution pursuant to ch. 985, F.S.; (2) has entered a plea to, or has been found guilty of, a felony, other than a capital or life felony, that was committed before the offender's 21st birthday; and (3) has not been previously sentenced as a youthful offender by a court.[2]

Section 958.04, F.S., provides that courts who elect to adjudicate and sentence a defendant as a youthful offender may: (1) impose probation or community control; (2) impose incarceration for up to 364 days, as a condition of probation or community control; (3) impose a split sentence that provides for incarceration followed by probation or community control; or (4) commit the youthful offender to the custody of the DOC.[3] These sentencing options are the exclusive sanctions that may be imposed for a court-adjudicated youthful offender[4], and, in general, the total sentence (probation or community control and incarceration) length may be no longer than six years.[5]

In cases where the court has elected adult, rather than youthful offender, adjudication and sentencing, the DOC may administratively classify a defendant as a youthful offender if that person: (1) is at least 18 years of age or has been transferred for criminal prosecution pursuant to ch. 985, F.S.; (2) has not been previously sentenced as a youthful offender by a court; (3) is less than 24 years old; and (4) has received a sentence that does not exceed 10 years.[6] Unlike court youthful offender adjudication, which results in a limited sentence length and the sealing of court records, DOC youthful offender classification only determines the programs and institutions in which youthful offenders may be placed.[7] Such DOC classification does not affect the original sentence imposed by the court.[8]

Basic Training

Section 958.045, F.S., requires the DOC to create a basic training program for youthful offenders (both those adjudicated as such by the court and those classified as such by the DOC), which lasts at least 120 days and includes marching drills, calisthenics, a rigid dress code, manual labor assignments, physical training, personal development training, general education and adult basic education courses, and drug counseling and other rehabilitation programs.[9] In determining eligibility for the basic training program, the DOC must find that a youthful offender: (1) has no physical limitations that preclude strenuous activity; (2) is not impaired; and (3) has not previously been incarcerated in a federal or state correctional facility.[10] Additionally, the DOC must consider the offender's criminal history and potential

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[1] In *Allen v. State*, 526 So.2d 69, 70 (Fla. 1988), the Court explained that youthful offender sentencing is more stringent than that of the juvenile system, but less harsh than the adult system.
[2] ss. 958.021, 958.04(1), F.S.
[3] s. 958.04(2), F.S.
[4] *Whitlock v. State*, 404 So.2d 795 (Fla. 3rd DCA 1981).
[5] s. 958.04(2), F.S.
[6] ss. 958.03(5), 958.11(4), F.S.; *Thomas v. State*, 825 So.2d 1032 (Fla. 1st DCA 2002).
[7] *Lezcano v. State*, 586 So.2d 1287 (Fla. 3rd DCA 1991).
[8] *Johnson v. State*, 586 So.2d 1322, 1324-1325 (Fla. 2nd DCA 1991).
[9] s. 958.045, F.S.
[10] s. 958.045(2), F.S.

rehabilitative benefits of "shock" incarceration.[11] If the statutory criteria are satisfied and space is available, the DOC must submit a written request to the sentencing court seeking approval for placement of the youthful offender in a basic training program.[12] If a youthful offender satisfactorily completes basic training: (1) the court must issue an order modifying the offender's sentence and placing the offender on probation; and (2) the releasing authority must establish a release date for the offender within 30 days following program completion.[13]

In the event a youthful offender subsequently violates his or her probation after completing basic training, the court, pursuant to s. 958.045(5)(c), F.S., may " . . . revoke probation and impose any sentence that it might have originally imposed ***as a condition of probation.***" (emphasis added). Section 958.04(2)(b), F.S., provides that one of the sentencing options that a court may originally impose is, "... a period of incarceration ***as a condition of probation*** ...," for up to 364 days. (emphasis added).[14] The Fourth District Court of Appeals has explained that, "Read together, these two [sections of] statutes have been consistently construed as limiting to 364 days the period of incarceration which may be imposed following successful completion of basic training."[15] In March 2004, the Third District Court of Appeals stated:

> The language of section 958.045(5)(c) may warrant further review by the legislature. We doubt that the legislature actually intended the result this language has created. We are inclined to believe that the legislature intended to permit the court to impose any sentence "that it might have originally imposed." Indeed, a judge may be hesitant to recommend boot camp in an effort to rehabilitate a youth if the judge realizes that the youth's sentence upon a future violation of probation will be limited to such a short term of incarceration. Nevertheless, the legislature has not amended the statutes since our opinion in *Bloodworth*, 769 So.2d 1117, and we are constrained by the plain language of the statutes.[16]

Effect of Bill
This bill amends s. 958.045(5)(c), F.S., to remove the phrase "as a condition of probation." This amendment will have the effect of removing the 364-day jail limit found to exist by Florida courts and will permit the court to sentence a youthful offender who has violated probation after completing basic training to any of the four sentencing alternatives that were originally available to the judge under s. 958.04(2), F.S.

C. SECTION DIRECTORY:

Section 1. Amends s. 958.045, F.S., deleting a provision limiting certain sentencing options available to the court following a violation of the conditions of probation by a youthful offender.

Section 2. This act takes effect July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

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[11] *Id.*
[12] *Id.*
[13] ss. 958.045(5)(c) and (8)(d), F.S.
[14] *Bloodworth v. State*, 769 So.2d 1117 (Fla. 2nd DCA 2000); *Burkett v. State*, 816 So.2d 767 (Fla. 1st DCA 2002).
[15] *Lee v. State*, 884 So.2d 460, 461 (Fla. 4th DCA 2004).
[16] *Blaxton v. State*, 868 So.2d 620, 621 (Fla. 2nd DCA 2004).

1. Revenues:

   None.

2. Expenditures:

   The Criminal Justice Impact Conference met February 28, 2006 and concluded that Senate Bill 1386, an identical bill, would have an indeterminate, yet minimal, prison bed impact on the Department of Corrections. See fiscal comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   Because youthful offenders who have violated probation following completion of DOC's basic training program may be sentenced to prison rather than jail, the bill may result in an indeterminate decrease in jail capacity requirements. See fiscal comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The Department of Corrections states that approximately 200 youthful offenders successfully complete basic training each year and are released on supervision. Of these, approximately 22 percent violate the conditions of their supervision. In most instances, pursuant to current law, violators are sentenced to up to 364 days in county jail. This bill may have a prison bed impact in that it will permit youthful offenders who have violated probation following completion of DOC's basic training program to be sentenced to prison rather than jail.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not applicable because this bill does not appear to: require the counties or cities to spend funds or take action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

   Art. I, s. 10, Fla. Const., prohibits passage of an ex post facto law. Accordingly, the portion of this bill increasing the possible penalty for violation of probation or community control by a basic training program graduate may only apply to an offender who committed his or her offense on or after the effective date of the bill.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

A 2005, Senate Criminal Justice staff survey of circuit court judges revealed that the vast majority of judges want greater discretion in sentencing youthful offenders who violate probation following completion of DOC's basic training program. The survey further revealed that, as a result of the sentencing limitation, many judges are reluctant to sentence defendants as youthful offenders or to approve a youthful offender's placement in basic training. After reviewing the statutes, caselaw, and survey responses, the Senate Criminal Justice Committee concluded that s. 958.045(5)(c), F.S., be amended to remove the language limiting the trial court's discretion to sentence a youthful offender who violates the terms of his or her probation after completing basic training.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

A bill to be entitled

An act relating to youthful offenders; amending s. 958.045, F.S.; deleting a provision limiting certain sentencing options available to the court following a violation of the conditions of probation by a youthful offender; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (c) of subsection (5) of section 958.045, Florida Statutes, is amended to read:

958.045 Youthful offender basic training program.--

(5)

(c) The portion of the sentence served prior to placement in the basic training program may not be counted toward program completion. Upon the offender's completion of the basic training program, the department shall submit a report to the court that describes the offender's performance. If the offender's performance has been satisfactory, the court shall issue an order modifying the sentence imposed and placing the offender on probation. The term of probation may include placement in a community residential program. If the offender violates the conditions of probation, the court may revoke probation and impose any sentence that it might have originally imposed ~~as a condition of probation~~.

Section 2. This act shall take effect July 1, 2006.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 7137 CS PCB CRJU 06-06 DOC Random Drug Testing
SPONSOR(S): Criminal Justice Committee, Kravitz
TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 1736

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Criminal Justice Committee	8 Y, 0 N	Cunningham	Kramer
1) Governmental Operations Committee	6 Y, 0 N, w/CS	Mitchell	Williamson
2) Criminal Justice Appropriations Committee	4 Y, 0 N	Sneed	DeBeaugrine
3) Justice Council			
4)			
5)			

SUMMARY ANALYSIS

The Department of Corrections is authorized to test its employees for the illegal use of controlled substances, including anabolic steroids, using *random* drug testing. The department is, however, precluded from testing its employees for the illegal use of steroids using *reasonable suspicion* drug testing under the Drug-Free Workplace Act because anabolic steroids are not included in the definition of "drugs."

This bill authorizes the Department of Corrections to develop a program to test employees in safety-sensitive and special risk positions for anabolic steroids using *reasonable suspicion* drug testing. The *reasonable suspicion* drug testing must be conducted in accordance with the Drug-Free Workplace Act, but may also be conducted based on violent acts or violent behavior committed on or off duty.

This bill requires the Department of Corrections to adopt necessary rules.

The Department of Corrections expects the fiscal impact of implementing this bill to be minimal, and will absorb these costs within its existing budget. This bill does not have a fiscal impact on local government.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government – This bill authorizes the Department of Corrections to conduct reasonable suspicion drug testing of certain employees for the illegal use of steroids. This bill increases the rulemaking authority of the Department of Corrections.

B. EFFECT OF PROPOSED CHANGES:

Drug Free-Workplace Act: Generally

Section 112.0455, Florida Statutes, is the Drug-Free Workplace Act. The Drug-Free Workplace Act authorizes[1] employers to conduct four types of drug tests: job applicant, reasonable suspicion, routine fitness for duty,[2] and follow-up.[3] The Drug-Free Workplace Act sets forth procedures for the collection of all specimens[4] and standards for laboratories.[5] The Drug-Free Workplace Act also provides employee protections[6] and confidentiality.[7]

Drug Free-Workplace Act: Reasonable Suspicion Drug Testing

Under the Drug-Free Workplace Act, *reasonable suspicion* drug testing is based on a belief that an employee is using or has used drugs in violation of the employer's policy and is drawn from specific, objective, and articulable facts and reasonable inferences from those facts in light of experience.[8] Among the facts and inferences permitted by the Drug-Free Workplace Act:

- observable phenomena while at work, such as direct observation of drug use or of the physical symptoms or manifestations of being under the influence of a drug;
- abnormal conduct or erratic behavior while at work or a significant deterioration in work performance;
- a report of drug use, provided by a reliable and credible source, which has been independently corroborated;
- evidence that an individual has tampered with a drug test during employment with the current employer;
- information that an employee has caused, or contributed to, an accident while at work; or
- evidence that an employee has used, possessed, sold, solicited, or transferred drugs while working or while on the employer's premises or while operating the employer's vehicle, machinery, or equipment.

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[1] Fla. Stat. § 112.0455(4) (2005) (employers do not have a legal duty to request that an employee undergo drug testing).
[2] Fla. Stat. § 112.0455(7)(c) (2005) (testing conducted as part of a routinely scheduled employee fitness-for-duty medical examination that is part of the employer's established policy or that is scheduled routinely for all members of an employment classification or group.).
[3] Fla. Stat. § 112.0455(7)(d) (2005) (testing which the employer may conduct for up to 2 years after an employee enters an employee assistance program for drug-related problems, or an alcohol and drug rehabilitation program.).
[4] Fla. Stat. § 112.0455(8) (2005).
[5] Fla. Stat. § 112.0455(12) (2005).
[6] Fla. Stat. § 112.0455(8) (2005).
[7] Fla. Stat. § 112.0455(11) (2005).
[8] Fla. Stat. § 112.0455(5)(j) (2005) (The DFWA provides that reasonable suspicion drug testing shall not be required except upon the recommendation of a supervisor who is at least one level of supervision higher than the immediate supervisor of the employee in question.).

Drug Free-Workplace Act: Steroids Not Tested

The drugs and metabolites tested by the Drug-Free Workplace Act do not include steroids.[9] Thus, state agencies are precluded from testing employees for steroids through *reasonable suspicion* drug testing under the Drug-Free Workplace Act.

Random Drug Testing: Department of Corrections

Section 944.474, Florida Statutes, prohibits employees of the Department of Corrections from testing positive for the illegal use of controlled substances and authorizes the Department of Corrections to develop a program for the *random* drug testing of all employees. Section 944.474, Florida Statutes, does not, however, define controlled substances or random drug testing.

Yet, the Department of Corrections, by rule, defines "random drug testing" as "a drug test conducted based on a computer generated random sampling in positions identified as being subject to random testing, administered for purposes of determining the presence of drugs or their metabolites."[10] Relying on the definition for "controlled substances" in section 893.02(4), Florida Statutes,[11] which includes steroids, the Department of Corrections tests employees for steroids through *random* drug testing.

Effect of the Bill

This bill authorizes the Department of Corrections to conduct *reasonable suspicion* drug testing of employees in safety-sensitive and special risk positions for anabolic steroids[12]. A safety-sensitive position is any position in which drug impairment would constitute an immediate and direct threat to public health or safety.[13] A special risk position is any position which is required to be certified under chapter 633 or chapter 943, Florida Statutes, as a condition of employment.[14] The *reasonable suspicion* drug testing must be conducted in accordance with section 112.0455, Florida Statutes, but may also be conducted based on violent acts or violent behavior committed on or off duty.

C. SECTION DIRECTORY:

Section 1: Amends s. 944.474, F.S., to authorize the Department of Corrections to conduct *reasonable suspicion* drug testing of employees in safety sensitive or special risk positions for steroids.

Section 2: Provides an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   The Department of Corrections expects the fiscal impact of implementing this bill to be minimal, and will absorb these costs within its existing budget.

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[9] Fla. Stat. § 112.0455(13) (2005).
[10] Rule 33-208.403, F.A.C.
[11] Fla. Stat. § 893.02(4) (2005) (means any substance named or described in Schedules I-V of section 893.03, Florida Statutes).
[12] Fla. Stat. § 893.03(3)(d) (2005) (An anabolic steroid is any drug or hormonal substance, chemically and pharmacologically related to testosterone, other than estrogens, progestins, and corticosteroids, that promotes muscle growth and includes 48 listed substances).
[13] Fla. Stat. § 112.0455(5)(m) (2005).
[14] Fla. Stat. § 112.0455(5)(n) (2005).

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill does not appear to have a direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require the municipalities or counties to spend funds or take action requiring the expenditure of funds; reduce the authority that municipalities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with municipalities or counties.

2. Other:

Fourth Amendment

The primary issues raised by employee drug testing policies revolve around Fourth Amendment rights against unlawful search and seizure. In general, the courts have upheld reasonable suspicion drug testing policies based upon *on-duty* drug use or impairment.[15] Courts have been divided, however, on the issue of whether *off-duty* drug use or impairment can form a legitimate basis for reasonable suspicion drug testing without falling afoul of the Fourth Amendment. The distinguishing factor seems to be whether the employee is in a safety-sensitive position.

For example, in *Benavidez v. Albuquerque*,[16] the court indicated that "information which would lead a reasonable person to suspect non safety sensitive employees . . . of on-the job drug use, possession, or impairment" would provide a sufficient basis for reasonable suspicion drug testing. Additionally, in *American Federation of Government Employees v. Roberts*,[17] the court found that employees of a correctional institution were primary law enforcement officers and therefore could be subjected to reasonable suspicion drug testing based upon either on or off duty conduct. Moreover, in *American Federation of Government Employees v. Martin*,[18] the court held that reasonable suspicion of safety sensitive employees could be conducted based on off-duty drug use or impairment.

Conversely, in *National Treasury Employees v. Yeutter*,[19] the court held that a reasonable suspicion drug testing program that tested non-safety sensitive employees for off duty drug use was unconstitutional. Similarly, in *Rutherford v. Albuquerque*,[20] the court found drug testing

[15] *See e.g., Saavedra v. Albuquerque*, 73 F.3d 1525 (10th Cir. 1996); *Garrison v. Department of Justice*, 72 F.3d 1566 (Fed. Cir. 1995).
[16] 101 F. 3d 620 (10th Cir. 1996)
[17] 9 F.3d at 1468 (9th Cir. 1993)
[18] 969 F. 2d 788, 792-93 (9th Cir. 1992)
[19] 918 F. 2d 968 (D.C. Cir. 1990)
[20] 77 F. 3d 1258, 1263 (10th Cir. 1996)

unreasonable, in part, because it screened for off-duty drug use which was wholly unrelated to employer's asserted interest in on the job safety.

By limiting reasonable suspicion drug testing to employees in safety-sensitive and special risk positions, this bill is consistent with the line of authorities which support testing employees in safety-sensitive positions.

B. RULE-MAKING AUTHORITY:

This bill requires the Department of Corrections to adopt necessary rules.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On March 29, 2006, the Governmental Operations Committee adopted a "strike-everything" amendment and reported the bill favorably with a committee substitute:

- Amendment 1 defined safety-sensitive and special risk positions. The amendment also required the *reasonable suspicion* drug testing to be conducted in accordance with the Drug-Free Workplace Act.

CHAMBER ACTION

The Governmental Operations Committee recommends the following:

Council/Committee Substitute

Remove the entire bill and insert:

A bill to be entitled

An act relating to drug testing within the Department of Corrections; amending s. 944.474, F.S.; authorizing the department to develop a program for testing employees who are in safety-sensitive and special risk positions for certain controlled substances based upon a reasonable suspicion; providing for the reasonable suspicion to include violent acts or behavior of an employee while on or off duty; requiring the department to adopt rules; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (2) of section 944.474, Florida Statutes, is amended to read:

944.474 Legislative intent; employee wellness program; drug and alcohol testing.--

(2) Under no circumstances shall employees of the department test positive for illegal use of controlled

substances. An employee of the department may not be under the influence of alcohol while on duty. In order to ensure that these prohibitions are adhered to by all employees of the department and notwithstanding s. 112.0455, the department may develop a program for the random drug testing of all employees. The department may randomly evaluate employees for the contemporaneous use or influence of alcohol through the use of alcohol tests and observation methods. Notwithstanding s. 112.0455(5)(a), the department may develop a program for the reasonable suspicion drug testing of employees who are in safety-sensitive or special risk positions, as defined in s. 112.0455(5), for the controlled substances listed in s. 893.03(3)(d). The reasonable suspicion drug testing authorized by this subsection shall be conducted in accordance with s. 112.0455, but may also include testing upon reasonable suspicion based on violent acts or violent behavior of an employee who is on or off duty. The department shall adopt rules pursuant to ss. 120.536(1) and 120.54 that are necessary to administer this subsection.

Section 2. This act shall take effect July 1, 2006.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 7201 PCB CRJU 06-10 Voyeurism
SPONSOR(S): Criminal Justice Committee
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Criminal Justice Committee	6 Y, 0 N	Ferguson	Kramer
1)			
2)			
3)			
4)			
5)			

SUMMARY ANALYSIS

This bill amends s. 810.14, F.S., to remove references to photographing, filming, videotaping, or recording from the definition of the offense of voyeurism. These activities would be covered by s. 810.145, F.S, which prohibits video voyeurism. This proposed change clarifies that someone who uses an imaging device to commit voyeurism should be charged under s. 810.145, F.S.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

This bill does not appear to implicate any of the House principles.

B. EFFECT OF PROPOSED CHANGES:

Current Law

Voyeurism

Section 810.14, F.S., which became law in 1998, provides that the offense of voyeurism is committed when a person, having lewd, lascivious, or indecent intent, secretly observes, photographs, films, videotapes, or records another person when the second person is in a dwelling, structure, or conveyance that provides a reasonable expectation of privacy. The Florida Standard Jury Instructions in Criminal Cases 11.13 for s. 810.14, F.S., states that the words lewd, lascivious, and indecent mean the same thing: a wicked, lustful, unchaste, licentious, or sensual intent on the part of the person doing the act. The phrase "reasonable expectation of privacy" is not defined in this section or in the Standard Jury Instructions.

A violation is a first-degree misdemeanor, punishable by imprisonment not exceeding one year or by a fine of not more than $1,000. If a person who violates this section has been previously convicted or adjudicated delinquent two or more times of any violation of this section, the subsequent violation is a third-degree felony, punishable by a term of imprisonment not exceeding five years, by a fine of not more than $5,000, or by a term of imprisonment not exceeding 10 years for certain violent or habitual offenders.

Video Voyeurism

Section 810.145, F.S., which became law in 2004, prohibits video voyeurism, video voyeurism dissemination, and commercial video voyeurism dissemination. Video voyeurism dissemination and commercial video voyeurism dissemination involve the distribution of images that are created as a result of video voyeurism.

The offense of video voyeurism may be committed in three ways. Each involves the use of an imaging device without the victim's knowledge and consent. "Imaging device" is defined as any mechanical, digital, or electronic viewing device, still camera, camcorder, motion picture camera, or any other instrument, equipment or format capable of recording, storing, or transmitting visual images of another person. This definition embraces the devices that could be used to observe, photograph, film, videotape, or record another person under the general voyeurism statute.

- A person can commit the offense by intentionally using or installing an imaging device to secretly view, broadcast, or record a person who is dressing, undressing, or exposing a sexual organ at a place and time when the person has a reasonable expectation of privacy. In order to violate the statute, the act must be done for the offender's own amusement, entertainment, sexual arousal, or profit, or for the purpose of degrading or abusing another person.

- A person can commit the offense by intentionally permitting the use or installation of an imaging device to secretly view, broadcast, or record a person who is dressing, undressing, or exposing a sexual organ at a place and time when the person has a reasonable expectation of privacy.

- A person can commit the offense by intentionally using an imaging device to secretly view, broadcast, or record under or through the clothing being worn by another person for the purpose

of viewing the person's body or undergarments. The act must be done on the voyeur's own behalf or on the behalf of another person, or for the amusement, entertainment, sexual arousal, gratification, or profit of the voyeur or another person.

The video voyeurism statute defines "place and time when a person has a reasonable expectation of privacy." It is a place and time when a reasonable person would believe that he or she could fully disrobe in privacy, without concern for being viewed, recorded, or broadcast. Examples include the interior of a bathroom, changing room, fitting room, dressing room, or tanning booth.

The punishment range for video voyeurism, video voyeurism dissemination, and commercial video voyeurism dissemination under s. 810.145, F.S., are identical to that of voyeurism under s. 810.14, F.S. The first violation is a first degree misdemeanor and a subsequent violation results in a third degree felony.

Similarities and Differences between Voyeurism and Video Voyeurism

In most cases, a person who is committing voyeurism or attempted voyeurism by means other than unaided visual observation would also be committing video voyeurism. There are undoubtedly theoretical exceptions, but these do not seem to have significance in the real world. For example, it is theoretically possible that someone could have lewd, lascivious, or indecent intent in viewing another person but not have the purpose of seeing the other person dressing, undressing, or exposing a sexual organ.

While there may be narrow exceptions to the general rule that the offense of video voyeurism includes the offense of voyeurism using an artificial device, the converse is not true. The offense of video voyeurism embraces criminal behavior that could not be charged as voyeurism under s. 810.14, including "up-skirt" photography in a public place.

Additionally, the penalties for voyeurism and video voyeurism are identical as noted above.

Effect of this bill

This bill amends s. 810.14, F.S., to remove references to photographing, filming, videotaping, or recording. This clarifies that the proper charge for voyeuristic activities using an imaging device is video voyeurism as set forth in s. 810.145, F.S. Because almost any activity using such devices to commit voyeurism can also be charged as video voyeurism under s. 810.145, F.S., there is no significant change in the law.

C. SECTION DIRECTORY:

Section 1 amends s. 810.14, F.S., relating to video voyeurism.

Section 2 provides an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   The Criminal Justice Impact Conference has not met to determine this bills prison bed impact on the Department of Corrections.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

A bill to be entitled

An act relating to voyeurism; amending s. 810.14, F.S.; revising the elements of the offense of voyeurism in order to eliminate acts of photographing, filming, videotaping, or recording, which are elements of the separate offense of video voyeurism; providing that a person commits the offense of voyeurism when he or she, with certain intent, secretly observes another person when the other person is in a location that provides a reasonable expectation of privacy; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 810.14, Florida Statutes, is amended to read:

810.14 Voyeurism prohibited; penalties.--

(1) A person commits the offense of voyeurism when he or she, with lewd, lascivious, or indecent intent, secretly observes~~, photographs, films, videotapes, or records~~ another person when the ~~such~~ other person is located in a dwelling, structure, or conveyance and such location provides a reasonable expectation of privacy.

(2) A person who violates this section commits a misdemeanor of the first degree for the first violation, punishable as provided in s. 775.082 or s. 775.083.

(3) A person who violates this section and who has been previously convicted or adjudicated delinquent two or more times of any violation of this section commits a felony of the third

degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(4) For purposes of this section, a person has been previously convicted or adjudicated delinquent of a violation of this section if the violation resulted in a conviction sentenced separately, or an adjudication of delinquency entered separately, prior to the current offense.

Section 2. This act shall take effect July 1, 2006.